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ABSTRACT

This comprehensive guide to the procedures and techniques of collective bargaining contains information on all phases of negotiations: the process, the players, preparation, face-to-face bargaining, impasse resolution procedures, and contract administration. It is predicated on the view that school board members and administrators should master these skills in order to limit the interference of collective negotiation in district operations and guarantee the public's right to a thorough and efficient public education system, while meeting employees' needs for fair wages and working conditions. Chapters are included on the following topics: (1) understanding the bargaining process, (2) the players, (3) the legal framework, (4) the board's negotiating team, (5) analyzing the current agreement, (6) analyzing union demands, (7) procedures for effective negotiations, (8) bargaining tactics, (9) communications at the table, (10) mediation, (11) factfinding, (12) teacher's strikes, and (13) contract administration. (TE)

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School Board Library Series
Volume 5

COLLECTIVE NEGOTIATIONS

BY
MARC GASWIRTH
and
GARRY M. WHALEN

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A PUBLICATION OF THE NEW JERSEY SCHOOL BOARDS ASSOCIATION

School Board Library Series Volume 5

COLLECTIVE *NEGOTIATIONS*

BY
MARC GASWIRTH
and
GARRY M. WHALEN

A PUBLICATION OF THE NEW JERSEY SCHOOL BOARDS ASSOCIATION
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New Jersey School Boards Association

School Board Library Series Volume 5

COLLECTIVE NEGOTIATIONS

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COLLECTIVE
NEGOTIATIONS

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FOREWORD

I am delighted to introduce the third edition of Volume 5 of the School Board Member Library Series, *Collective Negotiations*. This completely revised version of one of the most popular books in the Series will be an important addition to your library.

We all recognize the enormous budgetary and operational effect that the bargaining process has on New Jersey school districts. Well over half a school district's operating budget is committed to negotiated salaries and other benefits. In addition, negotiations can affect the operational aspects of a school district, from the number of hours and days employees work to the ability to buy textbooks or establish new educational programs.

Years ago, many school board members and administrators lacked bargaining sophistication; however, school board members today have demonstrated a growing awareness of the skills that they need to be effective negotiators. This volume will help them sharpen their bargaining skills so that they will protect better the interests of their school districts at the bargaining table.

My appreciation is expressed to the authors of this volume, Dr. Marc Gaswirth, Associate Director of Labor Relations and Garry M. Whalen, Director of Labor Relations, and to the rest of the Labor Relations staff for their effort and commitment on behalf of this project.

Lloyd Newbaker
Executive Director

INTRODUCTION

This book is primarily written for school board members and school district administrators. It provides a general understanding of the negotiations process, and describes detailed negotiations *procedures* and *tactics*. This information will help board members and administrators to represent and protect the interests of their local school districts in negotiations.

The book is structured to give the reader a sense of the full dynamics of the bargaining process. It contains information on all phases of negotiations: the process, the players, preparation, face-to-face bargaining, impasse resolution procedures, and contract administration.

Few board members ran for election to their local school boards because they wanted to negotiate with employee unions. Few administrators expected or desired to become intensely involved in labor relations when they sought an administrator's certificate and were eventually promoted to an administrative position. Nonetheless, a majority of New Jersey's six hundred school districts use a board member or a board president as their negotiations spokesperson. Approximately 40 districts statewide use a superintendent, an assistant superintendent or a director of personnel to lead their negotiations effort.¹

Even where a district uses a professional negotiator or a board attorney as its spokesperson, the board president will appoint a negotiating team comprised of a few board members and administrators to assist the chief negotiator at the bargaining table.

Board members and school administrators must thoroughly understand the negotiations process to perform effectively as either a spokesperson or team member. This book will help them in that task. It will also prove valuable to other board members who are not actively involved in negotiations. The negotiations process also affects them because they hold the ultimate responsibility for accepting or rejecting the agreement that the board's negotiating team reaches with the union.

¹Esther R. Strussman, *An Analysis of Teachers' Contracts in New Jersey 1981-82/82-83* (Trenton, N.J.: New Jersey School Boards Association, 1982), pp. 12-13.

Collective negotiations is indeed extensive in New Jersey, where bargaining agreements cover virtually all teachers as well as many principals, supervisors and support staff employees. Sixty-five percent of New Jersey teacher contracts provide for binding grievance arbitration.² Because these contracts include all the largest districts in the state, most New Jersey teachers have access to binding arbitration. In addition, many districts spend approximately 75 percent of their operating budgets for salary and fringe benefits, most of which are set through the negotiations process. Negotiations can take from three to 30 meetings to conclude, may last from one to 20 months, and can consume literally hundreds of hours in actual negotiations and in preparation time.

While school boards must bargain collectively with employee groups, they also have the responsibility to operate the schools through policy development, budget adoption, and the overall supervision of the school system. The duty to negotiate with employee unions and the binding and enforceable nature of negotiated agreements make this task that much more difficult.

School board members and school administrators should recognize that bargaining involves a delicate balance. On the one hand, the purpose of a union is to restrict management's freedom. That is not an anti-union statement. Any professional union representative will agree with that statement. School boards should limit the interference of collective negotiations in district operations, and guarantee the public's right to a thorough and efficient system of free public education for the children. On the other hand, the negotiations process should meet employees' needs for fair wages and working conditions.

The out-of-state reader should note that PERC is the New Jersey Public Employment Relations Commission. Comments regarding the requirements of the PERC Law may not apply to other public sector bargaining laws. Anyone wishing to know more about his state's bargaining law should ask his local board attorney. For the purpose of conciseness, "he" should be read as "he or she" whenever not in the context of a specific male. Also, "collective negotiations" is occasionally used interchangeably with "collective bargaining," or "bargaining." An important distinction between the two exists. Collective negotiations is the generic term for public sector bargaining in New Jersey, while collective bargaining is the term commonly associated with the private sector industrial model.

Garry M. Whalen
Director of Labor Relations

²Ibid, p. 23.

UNDERSTANDING THE BARGAINING PROCESS

1

INTRODUCTION

The collective negotiations process involves more than the time that the parties spend at the bargaining table; it is an ongoing, cyclical process. The process has four major goals: to settle competitive, cooperative, internal, and attitudinal issues. Each goal plays an important role in negotiations.

BARGAINING AS A CYCLICAL PROCESS

School district labor relations is not merely synonymous with direct face-to-face bargaining; instead, it is a continuous process affecting administrative and policy decisions throughout the school year. Labor relations is a cyclical process, in which the following activities occur: negotiations preparation, face-to-face bargaining, impasse procedures, settlement, and contract administration.



Each of these activities logically leads to another, and also determines how successful a school board will be at the next step in the labor relations process. Four statements illustrate this interrelationship:

- poor preparation weakens one's position during face-to-face negotiations;
- errors at the bargaining table and during impasse decrease the likelihood of settlement on terms acceptable to the school board, and increase the possibility that parties will not settle or that a strike will occur;
- mistakes, ambiguities and omissions in negotiating contract language make the period of contract administration much more difficult; and
- improper grievance handling and arbitration losses will stimulate new board demands for the next contract talks.

Various chapters of this book will deal with each step in the cycle of bargaining. The reader should remember that each step has a serious, sometimes determinative, impact on the next step in the process.

FOUR GOALS IN BARGAINING

Bargaining is not only a cyclical process; it also has four major goals. The parties attempt to achieve all these goals, sometimes without ever realizing it.

These goals are:

- to settle competitive issues;
- to settle cooperative issues;
- to resolve internal concerns within the groups involved in the negotiations; and
- to affect the attitudes and perceptions of the other party.¹

Competitive Issues

Bargaining is, by and large, an adversary process. Supporters of the process frequently describe it as "problem-solving procedure," or as a means to ensure "fairness to employees" regarding wages, hours and workload. But these statements may falsely suggest that bargaining entails nothing more than formal discussions between employers and employee groups. Bargaining is, essentially, a process that pits two opposing parties against each other to distribute some relatively scarce and

¹This approach to understanding the negotiations process was first advanced by Richard E. Walton and Robert B. McKersie in *A Behavioral Theory of Labor Negotiations* (New York, New York: McGraw Hill, 1965).

limited resources, primarily money and work time.

One goal of the process is the distribution of these limited resources. The difficulty is that such bargaining in this context is, by definition, a "we win, they lose" situation. Hence, the common perception that bargaining is a "haggling" process where people sit in smokey rooms until 5:00 a.m. arguing and threatening each other until they reach an agreement is fairly accurate as to the settlement of competitive issues.

The money the school board gives to its employees in the form of salary increases or fringe benefit improvements equals an exact decrease in the money this board has available to purchase textbooks, audio-visual equipment, sports equipment, and even to hire new employees for new or expanded programs. The paid time-off the board grants to employees, be it personal days, sick leave, or a duty-free lunch, equals that much less work time this board receives from those employees. It is the traditional problem of scarcity. Many interests clamor for "a piece of the pie," and when the parties determine who gets the larger pieces they also determine who gets the smaller pieces. Simply put, larger staff salary increases may mean fewer textbooks, blackboards, or desks for students.

Union negotiators, as well as school board negotiators, face this dilemma. The board may respond to a union demand for increased salaries by insisting that the union withdraw its demand for improved medical insurance. The union now must decide how the limited available dollars are spent. Many unions do not want this responsibility; they know that whatever gains they make, some employees will be disappointed. Unions avoid this dilemma in two ways. They insist on both increased salary and improved benefits. And, when it is apparent that both are not possible, the union blames the employer.

Work hours and workload are likewise competitive issues. Employee benefits in the form of decreased daily work hours or workdays, or increased paid free-time, are a direct loss in productivity, as measured in teacher-pupil contact time. An employer can succeed in lengthening the employees' workday, only if the union is willing to decrease the employees' after-school free time.

The following issues fall into this "win-lose" category:

- salary increases;
- insurance improvements;
- paid leaves of absence, including sick leave, personal leave, and sabbatical leave;
- preparation periods;
- duty-free lunch periods beyond the statutory minimum;
- length of the work year;
- length of the workday; and
- limitations on workload, such as no more than four teaching periods for department heads.

The employer and the union will readily agree to some of these topics. The parties may agree in concept on others, but seriously disagree concerning the details. Few school boards, for example, favor a salary freeze. Even if the union agreed to such a proposal, its effect on morale, turnover and recruiting outweighs the potential dollar savings. But no board would accept a union demand for a 20 percent salary increase in addition to the increment cost. The truly "competitive" nature of these topics becomes clear as the parties get closer to each other's positions, and begin to calculate the added cost of each additional movement toward the other party's position.

Cooperative Issues

All matters discussed in negotiations are *not* "we win, they lose" topics. Many topics are "cooperative" issues, and they become a most challenging and rewarding aspect of the negotiations process.

Agreement on "cooperative issues" directly benefits both parties. Bargaining cooperative issues is correctly designated a "problem-solving" process, as labor and management work together to define employee or administration concerns and then formulate solutions to these problems.

Procedures for filling job vacancies are a cooperative issue. The union is interested in seeing that all present staff have a fair opportunity to apply for vacant positions. The school board is equally concerned. It wants the district's administrators to consider all qualified and interested employees before they recommend someone for the job. Examples of agreements meeting both side's legitimate interests, at virtually no cost, include:

- posting notice of a vacancy a reasonable time before the vacancy must be filled;
- permitting all employees to apply for such vacancy or vacancies; and,
- notifying interested staff about vacancies which arise during the summer break.

This, of course, could easily become a "competitive issue," should the union press for limitations on the administration's discretion as to who will ultimately fill the vacancy. Union demands that the board give certain employees preference in appointments and promotions are not uncommon. Preference often means that the board must select present staff instead of outside applicants, senior staff instead of newly hired staff, or volunteers instead of non-volunteers. Under current New Jersey law, these limitations are illegal topics for negotiations, but they still highlight the way in which cooperative issues can become "win-lose" topics.

Tuition reimbursement is another example. In theory, tuition reimbursement plans seem to benefit both employers and employees. Employers receive the benefit of their employee's increased knowledge. Employees gain information that should make them better teachers, and

also earn additional college credits that permit them to move across the salary guide.

But a poorly designed tuition reimbursement plan can bring little or no benefit to the district and can be very costly. For example, a plan containing no limitation on what kinds of courses are acceptable for reimbursement could mean that the board would reimburse teachers for taking college courses of no relevance to their present jobs; indeed, these courses might prepare them to move to another job outside the district! Most tuition reimbursement plans also carry a double cost to the employer—paying for the course credit and then paying the employee a higher salary after he has accumulated a certain number of credits and/or an advanced degree. This is particularly undesirable should there be no limit on the kind of credits needed for salary guide movement. Some districts even permit teachers to apply undergraduate courses to move from the BA column to the BA + 15 or BA + 30 column of the salary guide.

The converse is also possible. Many proposals that initially are competitive in nature can be transformed into "we win, they win" matters through some ingenuity at the bargaining table.

Sabbatical leave is a good example. Some districts have treated it as strictly an employee fringe benefit. An employee may take a leave of absence, usually at 50 percent of current salary, to travel, study or do research, all of which may be unrelated to his district responsibilities. The district here clearly gains little or nothing. Other districts have negotiated reasonable limitations on sabbaticals, so that the district and the affected employee both benefit. In these districts, the contract may limit the number of sabbaticals per year; may define their purpose; and may limit payment to a portion of salary which, when combined with a substitute's cost, does not equal much more than the normal full salary of the employee on sabbatical. The contract may also require the employee to work in the district for two years following the sabbatical or else refund the sabbatical leave salary, and may further exclude college courses that the teacher takes during the sabbatical leave from the tuition reimbursement program.

The following list, while not all-inclusive, contains the more common cooperative issues. Each topic could become a burden, however, without counterbalancing benefits, such as economic and administrative limitations:

- evaluation procedures;
- absenteeism procedures if tied to employee incentives;
- transfer and assignment procedures;
- promotion procedures;
- consultation on non-negotiable matters;
- sabbatical leaves; and
- tuition reimbursement.

Internal Bargaining

An important part of the negotiations process occurs primarily away from the bargaining table. "Internal bargaining" describes the "bargaining" which occurs separately among the board's negotiating team members and among the union's negotiating team members.

The board's negotiating team must enter negotiations with an understanding of the board's goals. The team should not initial any tentative agreement unless it is sure that the full board will ratify that agreement.

But individual board members have different interests. Some board members believe that the voters elected them specifically "to hold the line on taxes," or "to cut teacher salaries." Many board members are elected because the teachers' association gave them tacit or, sometimes, active support. Other board members are so committed to the quality and continuity of the educational program that they will concede to virtually any union demand, should the district face a threatened or actual strike or slowdown.

The district's administrators also have their own interests. Some administrators may strongly dislike contract language restricting their discretion regarding building and program operations. They may press the board to negotiate changes in such language. Other administrators may support a generous salary and benefit package because they are likely to receive the same benefits themselves. Certain administrators may want teachers to do committee work after school, while others may want to limit the extent of teacher/union-administration consultation before they can make administrative decisions.

Each district, thus, will have its own set of conflicting and competing interests, affected by the personalities and backgrounds of the board members and administrators. The board negotiating team must reconcile these diverse interests and develop a consensus on the district's bargaining goals. Should this not occur, the full board may reject the team's tentative agreement. The team must then return to the negotiating table with much less credibility and with an extremely difficult task before it.

The consensus that eventually emerges may involve some "horse-trading"; for example, the initial board guidelines may permit a new fringe benefit but demand a moderate salary increase, a narrow definition of personal leave, and increased teacher availability for curriculum development and parent-teacher conferences. The team may need to achieve at least one of these latter items; otherwise, it may not gain the votes necessary to ratify the tentative agreement. In other situations, the board team must achieve all these goals to protect a fragile consensus from disintegrating.

Internal bargaining is even more apparent in the union, because the rank and file elect the union officers. The union membership is not a homogeneous group, but is made up of individuals with special, and sometimes contradictory interests.

Factions or special interest groups exist in nearly all teachers' unions.

- **Older teachers vs. younger teachers** may frequently have contrary positions on the distribution of monies on the salary guide, and on the desirability of improving salaries at the expense of additional benefits, such as health insurances or sick leave increases.
- **Tenured vs. non-tenured teachers** may have opposing positions concerning the connection between higher salaries and the layoff of present teachers.
- **Elementary vs. high school teachers** probably have different workload and preparation time concerns.
- **Teachers holding extracurricular positions** have an obvious interest in improving the stipends for those positions.
- **Self-confident teachers** may have less concern about the details of evaluation procedures than teachers who are less self-confident about their professional performance.

The union leadership is responsible for balancing these varied and sometimes opposing viewpoints; however, it usually begins negotiations with demands which reflect the interests of all its members. "Internal union bargaining" occurs during the drafting of the initial proposals and continues throughout the bargaining process. It will be an integral factor in fashioning a final package that the leadership will support and the membership will approve.

Attitudinal Bargaining

The final aspect of collective negotiations reflects each side's attempt to influence the other side's perceptions of it. "Attitudinal bargaining" does not concern particular demands or concessions, but rather deals with the relationship of the two parties during and after negotiations.

Both the union and the school board want to be perceived as the legitimate representative of its constituents' interests. The union wants to establish itself as a partner in the operation of the school district, at least regarding terms and conditions of employment, and frequently regarding educational policy. The school board and administration seek the union's acceptance of a limited role in school operations.

Each side hopes to prove during the bargaining process that it can be tough and unafraid to take risks to properly represent its interests. Each side also wants to appear reasonable. This image of reasonableness will encourage one side to agree eventually to the other side's offers.

All these subtle attitudinal goals influence the manner in which the parties conduct themselves at the bargaining table, in public statements and in other actions taken during negotiations, such as the union's filing of unfair practice charges or the board's preparing a strike contingency plan; each party will use various tactics to influence the perceptions of

the other party, rather than to win a particular concession. This explains so much of the public posturing and negotiations tactics that many lay people view as silly and even counterproductive.

SUMMARY

Bargaining is a complex, cyclical process in which one element is intimately related to and dependent upon all other elements. It includes preparation, face-to-face bargaining, impasse procedures, settlement, and contract administration. Bargaining occurs in a number of forms and in a variety of ways, and has four major goals: to settle competitive issues; to settle cooperative issues; to resolve internal concerns within each group; and to affect the perceptions and attitudes of the other side. School board negotiators who understand the bargaining process can minimize unnecessary costs and increase chances for settlement on terms acceptable to the board.

THE PLAYERS

2

INTRODUCTION

If negotiations can be viewed as a form of theatre, then it is helpful to identify the players or actors and the composition of the audience. It is also interesting to examine the role, size and relative strength of each of the major players and see how their combined activities affect those in the audience who are affected by their performance on the bargaining stage. Knowing who the players are puts in perspective the drama and intrigue normally associated with the collective negotiations process.

THE PLAYERS

There are essentially four types of players in the collective negotiations drama: the school board, the union, the employees, and the public. The traditional view of collective negotiations is that representatives of the school board and the union sit down to negotiate terms and conditions of employment. The result of their efforts is a new agreement; however, this view misses an important element in the process. Both the school board and the union have different constituents to whom they are legally, and morally, committed. A school board acts in the public interest; therefore, its larger constituent body is the public, and specifically the students of the district. On the other hand, a union is a private interest group, existing to serve the specific needs of its constituency—the employees covered by the negotiated agreement.

THE SCHOOL BOARD AND ITS CONSTITUENTS

There are nearly 600 operating school districts in New Jersey, and almost every one of them negotiates with at least one employee organization. In fact, school boards commonly negotiate with two or more bargaining units. Thus, the scope of school board involvement in collective bargaining in New Jersey is indeed extensive.

When a school board negotiates, it is acting on behalf of a number

of other players whose status in some way is affected by bargaining results. School administrators, students and the public are prominent among these other players.

The chief school administrator, board secretary/school business administrator, principals, and supervisors are part of the management team. They should have a strong interest in what the negotiating parties eventually agree to. Their interests are extremely important because it is they, not school board members, who must operate the school district on a day-to-day basis.

These administrators often assume a low key, but nevertheless important role in bargaining. Many upper-level administrators, including the chief school administrator and the board secretary, attend the bargaining sessions as key resource people. School board negotiators should respect their understanding of the administrative and financial impact of board agreement on a given union proposal. As will be discussed later in Chapter 5, the board negotiator should also be aware of the concerns and priorities of the district's middle-level managers (principals and supervisors). These individuals can offer the negotiating team valuable information needed to make the most informed decisions based on the district's best interests.

Student needs are often not mentioned in the bargaining process. But they are not forgotten. The school district exists primarily to serve the interests of students; however, the collective bargaining setting is not the most conducive place in which to discuss these interests.

Bargaining affects students in a number of areas. When a school board negotiates a reduction in the length of the teachers' work year, workday, or overall teaching time, students are clearly affected. When teachers are not required to work, students, obviously, cannot be served.

If the amount and quality of instruction determine, to some extent, how much students learn, then a reduction in the amount of student-teacher contact time directly affects the level of learning that goes on in the schools.

Teachers do not ask for reductions in the length of the work year, workday, or student contact time for laudable educational reasons. They do not ask for an increase in preparation time because of an overriding concern that students should be exposed to music, art and library programs. These demands are designed, purely and simply, to make their jobs easier, not to increase student learning.

Thus, it falls to the school board to protect that part of the audience that bargaining most directly affects: the students of the district. Many teachers are deeply concerned about the educational program. But the collective bargaining setting is inappropriate for serious consideration of these concerns, because the union's primary intent must always be to improve the employee's, not the student's, well-being.

The public concern about bargaining involves not only how it will affect the quality of instruction in the district, but also whether it will result

in an increased local tax rate. School board members are, by and large, elected by their communities to improve the educational quality of the district *within the financial means of the district to do so*. This last phrase is important because the citizenry expects the district to provide a high quality of educational services at a reasonable cost. That is a very difficult balance to maintain, and is an extremely sensitive issue that a school board faces in bargaining. Put another way, how can a district provide quality education to its students and be fair to its employees, while at the same time be extremely careful with the way in which it spends the hard-earned tax dollars that the citizenry pays? This is more than a philosophical question. This is a question that a school board must answer every time it sits down at the bargaining table.

THE UNIONS

There are two major unions representing public school teachers in New Jersey: the New Jersey Education Association (NJEA), which is by far the larger of the two, having affiliates with majority bargaining status in all but approximately ten school districts, and the New Jersey State Federation of Teachers (NJSFT). These two unions are the state affiliates of the National Education Association and the American Federation of Teachers, respectively. A local school board does not negotiate directly with either the NJEA or the NJSFT, but rather bargains with one of its local affiliates. These local unions generally have names that identify them as either NJEA or AFT affiliates. The term "association" is synonymous with NJEA-NEA affiliation, whereas the term "union" generally denotes a NJSFT-AFT affiliation. At that point the distinction often ends.

The extent of the NJEA organizational strength can be seen in the size of its membership and its full-time and part-time staff. There are approximately 110,000 NEA-NJEA members in New Jersey, 87,000 of whom are public school teachers. Support staff personnel, school administrators, and retired school employees constitute most of the additional 20,000 members. The size of NJEA staff is equally impressive. There are eighty-one full-time professional staff members, of whom thirty-seven are full-time UniServ representatives based in sixteen field offices throughout the state. In addition to the full-time representatives, each UniServ area has a number of part-time, per diem consultants (local teachers) who share negotiations responsibilities with their full-time counterparts. Thus, NJEA affiliated locals have at their disposal professional union representatives who are available to assist them in bargaining as well as in contract administration activities.

In connection with bargaining activities alone, the NJEA's Research Division annually produces numerous bulletins containing a wealth of collective bargaining data. School employees use these data to support their demands at the bargaining table, in mediation and in factfinding.

The NJSFT has local teacher affiliates in New Jersey, approximately ten of which have majority bargaining status, including two of the state's largest school districts. The total AFT membership in New Jersey, including some support staff and school administrators, numbers around 8,000, including faculty members at the state and county colleges. The NJSFT staff, as would be expected, is considerably smaller than that of the NJEA, and is assisted, to some extent, by the staff of the state AFL-CIO with which the NJSFT is affiliated.

There are several smaller organizations representing school employees in New Jersey. The New Jersey Principals and Supervisors Association (NJPSA) is an organization representing middle-level school managers (principals and supervisors) in negotiations. The Teamsters union represents some blue collar school employees in a few school districts. Some school employees have formed their own independent unions that have no direct affiliation with any other organization.

Regardless of which union it has to deal with, a school board should recognize that a union's number one priority is to protect and advance the interests of its membership. Teacher organizations take positions on educational issues, but these positions are inextricably tied to their members' interests as the union perceives them.

EMPLOYEES

Employees are also major players in the bargaining drama even though it is the union, primarily, that speaks on their behalf. The union not only affects the thinking of the membership but is, itself, affected by the views and attitudes of the membership. For example, the union leadership may believe that agency shop is a critical issue in negotiations and will attempt to convince its membership of the same. On the other hand, the leadership must respond to membership complaints about inadequate personal leave allowance.

In effect, a union molds the views of its membership, but cannot be insensitive or indifferent to the concerns of that membership. Unions are highly political organizations. A groundswell of disenchantment in the elementary schools over a lack of guaranteed preparation time demands a responsive signal from the union. The concern may be without sound basis, but the union must rise to the occasion if only to meet its political obligations. The way that the union meets these political obligations in negotiations is discussed in Chapter 6.

Employees do play a direct role in negotiations, although only representatives appear at the bargaining table. Prior to the commencement of each negotiations, a local union will often survey its membership to determine what items the members would like to see included in the list of initial union demands. The union includes many of these suggestions on the list as a way of showing the membership that the union is

listening to them. The union recognizes that many demands are throwaway items, but includes them in the package to mollify disenchanted employees who have a particular "axe to grind." But it would be incorrect to assume that individual member interests are not important. For example, if enough individual members identify the same concern, the union obviously has to treat that concern seriously in bargaining.

There are certain union demands that are almost always viewed as important: the ones that originate with the union leadership or negotiating team. Employees make up the union leadership, and it is not uncommon to see disaffected employees seize the opportunity to assume a union leadership position, including membership on the negotiating team, to advance and promote their own priorities. The board's negotiating team should develop a profile of the union negotiating team members to assess their priorities. Information on each union negotiating team member might include his current salary, any additional compensation or benefits earned (stipends, released time), placement on the guide, academic preparation, school and grade level or position assigned to. The point is not to build a dossier on each bargaining team member, but to understand his connection to a particular demand or demands. It should not surprise veteran school board negotiators that union negotiators do the same. Bargaining, after all, involves a little intrigue.

The third area where employees are involved, this time directly, is at the end of the process, namely, at ratification. The union has to develop a settlement package to ensure membership ratification, not merely by a plurality but preferably by an overwhelming majority. Unions run the risk of alienating a large segment of their membership when they ignore a major membership concern. For instance, union members in some districts have rejected tentative agreements because the new monies on the salary guide have not been distributed in accordance with their desires. Boards should not "back off" on the issue of salary guide distribution or any other matter because of the union's assertion that the membership will not "buy it." Selling the package is not the school board's job; it is the union's job. Boards still must assess the accuracy of the union's assertion; if it seems correct, the board may have to modify its position somewhat.

BARGAINING UNIT STRUCTURE

One important aspect of the bargaining relationship rarely discussed but which extensively affects that relationship is the bargaining unit structure. The bargaining unit structure represents which titles or groups of employees are covered by a particular agreement. There are all types of bargaining unit configurations, which have an effect on the bargaining process. This effect may be either positive, negative or inconsequential. Two typical bargaining unit structures are discussed below.

The Comprehensive Unit

PERC has sanctioned the existence of broad-based, functional bargaining units, with only minor exceptions.¹ The dominant characteristic of this unit is the inclusion of different groups of employees covered by the same agreement. A comprehensive bargaining unit might contain any or all of the following groups of employees: professional teaching staff members, custodians, maintenance employees, secretaries, clerks, bus drivers, teacher aides, cafeteria employees, and substitute employees.² About 21 percent of New Jersey school districts have bargaining units containing both teachers and some other category of employee.³

The inclusion of these different types of employees in the same bargaining unit has advantages and disadvantages to the union and the school board. The obvious advantage to the union is that there is greater strength in greater numbers. The threat of disruptive militant action looms larger because, potentially, all employees, and not just a group of them, may heed the "clarion call" to demonstrate or engage in a job action or strike. On the other hand, there is an obvious disadvantage. The union's job is now clearly more complicated. The union must address and eventually reconcile the disparate interests of these various employees before the parties settle. This is not an easy task for the union, but, on balance, the increased bargaining power inherent in a comprehensive bargaining unit structure more than offsets these internal organizational problems that a union might face.

Likewise, from a school board's perspective, a comprehensive bargaining unit has benefits and drawbacks. The obvious benefit is that the school board is engaged in fewer sets of separate negotiations. Instead of having to negotiate separate contracts with each group or a few groups of employees, the school board now may negotiate with only one. This new situation cuts down on the number of meetings and the excessive amount of time associated with multiple unit negotiations. The disadvantages, however, are equally compelling. First, a school board is dealing with a more powerful group both in terms of sheer numbers and organized strength; therefore, the board cannot take the threat of militancy too lightly. Second, a school board loses its flexibility to deal with these smaller groups of employees as separate entities. A school board can no longer decide to offer support staff employees a higher percentage increase than it has offered to professional staff without the attendant concern that the professional staff will insist on equal treatment. In effect, the school board's bargaining flexibility is diminished vis-a-vis those employees who

¹Those exceptions are set forth in *In re Englewood Board v. Education*, PERC No. 82-25, 7 NJPER 12229.

²*In re Board of Education of the Township of West Milford*, PERC No. 56 (1971).

³Esther R. Strassman, *An Analysis of Teachers' Contracts in New Jersey 1981-82/1982-83* (Trenton, N.J.: New Jersey School Boards Association, 1982) p.11.

may require special consideration but whose fate now is frequently controlled, in large measure, by another group of employees—the professional staff members.

The Single Unit

Most school districts separately bargain with their teaching staffs. Many school districts negotiate with at least two, and sometimes more, individual bargaining units. These individual units may be comprised of administrators/supervisors, professional teaching staff members, custodians, secretaries, or bus drivers, although it is rare for a district to negotiate separately with all of these groups. Normally there is some combining of various groups of employees into a large unit. Were this not the case, then even the smallest district could be negotiating with perhaps two custodians in one unit, three secretaries in another, and so on. Certainly, this is not an efficient way of conducting negotiations.

The advantages and disadvantages of multiple, individual unit bargaining have already been examined. A school board has the right to refuse to agree to the expansion or consolidation of existing bargaining units, and can argue before the Public Employment Relations Commission against such alterations in the bargaining units in its district. If a board is willing to permit such alterations, it can agree to do so, but should demand an appropriate *quid pro quo* for such an agreement. A school board, however, should assert its rights to refuse to bargain with employees who have no collective bargaining rights under the law, specifically, the school superintendent, assistant superintendent, and confidential employees. In addition, a school board, except in unusual cases, can challenge a bargaining unit that contains supervisory and non-supervisory employees.

SUMMARY

By and large, school boards in New Jersey negotiate with affiliates of the New Jersey Education Association (NJEA) and the New Jersey State Federation of Teachers (NJSFT). Other employee organizations are also active in New Jersey, including affiliates of the New Jersey Principals and Supervisors Association (NJPSA), the Teamsters union and other independent unions; however, there are a number of supporting players, including school administrators and supervisors, students, the taxpayers and school employees. The collective negotiation process directly affects each of these players in several ways. The way the new agreement determines student-teacher contact time will directly affect the amount of in-

⁴See *Negotiations News/School Law Reporter*, November/December, 1981 and *Negotiations* 1983 for more on this subject.

struction that students might receive. The negotiated salary increase might result in substantial tax increases for the local citizenry. Finally, the terms of a newly negotiated contract will directly concern the employees covered by that contract. School boards, thus, must reconcile and balance the competing interests of students for whom they work, taxpayers whom they represent, and employees to whom they wish to be fair. It is an extremely delicate and difficult role to play.

INTRODUCTION

The law that regulates collective negotiations in New Jersey is commonly known as the PERC Law. The PERC Law establishes the "rules of the game"; it does not determine the winners and the losers in the process. The law and subsequent administrative agency and judicial decisions have established the framework within which public sector bargaining takes place. They spell out the rights and responsibilities of public employers and employee organizations, the rights of employees, and the functions of the Public Employment Relations Commission (PERC).¹

ARE UNIONS AND EMPLOYERS EQUALS?

The school board and the union have the same legal status at the bargaining table. The law provides that the union is an "equal party" in deciding what terms and conditions of employment the bargaining unit employees receive. This "equal party" status distinguishes a formalized bargaining relationship from employee relations in the absence of this relationship.

Many studies show that little or no difference exists in the wages and major fringe benefits that non-union public employees receive as compared to those won in negotiated agreements.² The major difference, then, is one of *process*, not *results*; that is, *how* the wage and benefit decisions are made, *not what those decisions are*.

But it is misleading to state that the union and the public employer are equal partners in the negotiation process, because the employer has

¹The legal framework of bargaining is comprehensively covered in two other NJSBA publications. See Garry M. Whalen, Cathleen Otto, and Bruce Taylor, *The Public Employment Relations Law* Vol. 5, (Trenton, N.J.: New Jersey School Boards Association, 1979), and Marc Gaswirth, Garry M. Whalen, and Cathleen Otto, *Administering the Negotiated Agreement* Vol. 7, (Trenton, N.J.: New Jersey School Boards Association, 1980), pp. 1-13.

²David B. Lipsky, "Bargaining on Teacher Pay: A Review of the Evidence." *Educational Administrative Quarterly*, 18 (Winter 1982): 14-22.

at least three special advantages.

- ***The employer retains the money and the managerial authority until it gives them away.*** Because good faith bargaining does not obligate the employer to make a concession on any particular item, the employer generally finds itself in a better position than the union.³
- ***The burden of proof is always on the party attempting to change the status quo.*** The union is almost always the moving party in negotiations as it tries to obtain more from the employer. The exception occurs when management seeks to retract or modify previous concessions in subsequent negotiations.
- ***In the absence of an agreement, the status quo remains unchanged.*** A union unable to get the employer to agree to its demands after the contract expires must live indefinitely under the terms of the expired contract. Teachers do not receive salary increases, except those increments due under the old salary guide, or new or improved fringe benefits until the parties reach a new agreement.⁴ In contrast, the employer incurs no substantial increase in its salary costs during this period. Even though the agreement will usually provide for retroactive salary increases, the board may meanwhile invest the uncommitted salary increases. The employer also benefits from a late settlement regarding a new fringe benefit because many fringe benefits cannot be made retroactive.

This does not mean that the union is really involved in "collective begging" as some union negotiators would have board negotiators believe. Unions can use many effective bargaining tactics to push the employer to make a concession it would otherwise not make; still, an effective school board negotiator must recognize the *inherent advantages* the employer has before he considers how to *improve* his bargaining effectiveness. He should start first with an understanding of the rights and responsibilities that the bargaining law imposes.

PURPOSE OF THE LAW

The law sets the rules of conduct that the adversaries follow to determine the distribution of scarce resources: money and work time. The ultimate purpose of a collective negotiations statute is to *facilitate voluntary agreements* between labor unions and employers. The assumption is

³State of New Jersey v. Council of New Jersey State College Locals, 141 N.J. Super. 470 (App. Div. 1976).

⁴Galloway Township Board of Education v. Galloway Township Education Association, 78 N.J. 25 (1978).

that the law will help the parties reach an agreement cooperatively; this will foster "labor peace" and, in turn, avoid disruptions in the delivery of public services.⁵

The law merely regulates the bargaining process; it does not predetermine which side wins and which side loses. Bargaining outcomes are not as important as bargaining agreements, as long as that agreement does not violate state laws or regulations. A negotiated salary settlement resulting in employee layoffs and program cuts is not illegal. A guaranteed sabbatical leave at full pay for teachers at the end of each five full years of service is not unlawful, although it would be an administrative and financial disaster.

"Settlement is the name of the game" is the unstated slogan of public sector labor law agencies throughout the nation. School board negotiators should not assume that the law protects the interests of school districts and students. The rules of the bargaining game require that *the board's negotiating team must carry the burden of protecting those interests.*

COMPONENTS OF THE LAW

The New Jersey Employer-Employee Relations Act, Chapter 123, Public Laws of 1974 regulates school district collective negotiations, as well as those involving most other public employers. This statute typifies many public sector labor laws found across the country, and is modeled, somewhat, after the federal National Labor Relations Act which covers many private sector employees.

The PERC law directly affects three parties: the employee, the union, and the employer. Under the law, as at the bargaining table, employees and unions are not synonymous. Each has different rights, and unions, moreover, have special obligations to the employees they represent.

Employee rights include the following:

- to join, form or assist a union or to refrain from so doing;
- to bargain through representatives of their own choosing over terms and conditions of employment;
- to have a final agreement reduced to writing, thereby creating a legally binding and enforceable contract; and,
- to file grievances over the violation, misapplication or misinterpretation of policies, agreements, and administrative decisions affecting terms and conditions of employment.

Union rights include the following:

- to represent employees regarding terms and condition of employment;

⁵N.J.S.A. 34:13A-2.

- to negotiate with the employer on such items;
- to file grievances on behalf of employees; and,
- to be the *exclusive representative* of the employees that the negotiated agreement covers; *exclusivity* is a very important right to unions, because the employer cannot bargain with any other union regarding those employees, nor can any other union file grievances on behalf of those employees, even if the employees request it; moreover, exclusivity protects the union (bargaining agent) that negotiated the agreement from being replaced by a rival union during the life of the agreement.⁶

Employer rights are not stated explicitly in the PERC law. The New Jersey Supreme Court, in its *Ridgefield Park* decision, has held these rights to be implicit in the law.⁷

Although the law grants rights to employees, unions and employers, it also imposes certain responsibilities on unions and employers.

Union responsibilities include the following:

- no interference in the employer's choice of its negotiations representative;
- no interference in employee rights that the Act grants, such as the right to join or not to join a union; and,
- *the duty of fair representation* which requires the union to fairly represent all employees that the contract covers regardless of their union membership status; the union cannot refuse to process a grievance to arbitration merely because the grievant does not belong to the union; this duty of fair representation is essentially the *quid pro quo* for the union's right to *exclusivity*.

Employer responsibilities include the following:

- no interference in the employee rights outlined earlier;
- no threats of reprisal or promises of benefit can be made to influence employee membership in the union;
- no employee can be discriminated against regarding hire, promotion or any employment conditions solely because of his support for or activity in the union; and,
- no employee can suffer reprisals for filing an unfair practice charge against the employer; it would emasculate the PERC law if an employee could be disciplined or discharged for seeking to enforce his legal rights.

Finally, both the employer and the union have the obligation to *bargain in good faith* discussed in detail below.

⁶See *The Public Employment Relations Law*, pp. 11-20.

⁷*Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 N.J. 144 (1978).

ENFORCEMENT OF THE LAW

The Public Employment Relations Commission (PERC) administers the bargaining law. PERC is comprised of seven members, representing public unions, public employers and the general public, and is headed by a full-time chairman who serves as one of the three neutral representatives.⁸ PERC's role is to enforce the law and promote labor peace. PERC will not write the terms of a collective bargaining contract, because the law's clear intent is to effectuate voluntary settlements.⁹ PERC has limited authority to enforce the law; it cannot punish a violator of the law, but can only put the parties back to where they would have been had no violation of the law occurred. For instance, an employee who is illegally discharged could be awarded backpay plus interest and reinstatement, but not punitive damages.¹⁰

PERC FUNCTIONS

PERC exercises authority in four major areas: impasse procedures, representation, unfair practices, and scope of negotiations.

Impasse Procedures. PERC provides *mediators* and *factfinders* to help employers and unions arrive at voluntary settlements. Mediators and factfinders are neutral in the negotiations process. They represent neither management nor labor, but rather the public's interest in the resolution of negotiations impasses.¹¹

Representation. PERC defines which employees should be grouped together for the purpose of determining the appropriate bargaining unit for collective negotiations. PERC also holds elections to determine which union, if any, employees want as their bargaining agent.

Unfair Practices. PERC investigates allegations that the union or employer has violated any of the rights and responsibilities of the parties outlined earlier. PERC will hold hearings, if necessary, receive testimony and evidence from all affected parties, and issue a decision. Should PERC find a violation, it will order the party committing the unfair practice to take certain remedial action.

Scope of Negotiations. PERC defines what topics school boards can

⁸N.J.S.A. 34:13A-5.2.

⁹N.J.S.A. 34:13A-6.

¹⁰N.J.S.A. 34:13A-5.4.

¹¹See Chapter 11 "Mediation" and Chapter 12 "Factfinding" for more information on these subjects.

legally negotiate with their employees' unions. There are two categories of negotiable topics: *required* topics and *illegal* topics.¹²

The New Jersey Supreme Court has defined *required* or *mandatory* topics as those matters which must pass a three-factor test.¹³ To be negotiable, a subject

- must intimately and directly affect the work and welfare of public employees; and
- must not be preempted by a statute or regulation which speaks in the imperative and leaves nothing to the discretion of the public employer; and
- must not significantly interfere with the exercise of inherent management prerogatives pertaining to the determination of governmental policy.

When the subject intimately affects employees' working conditions but does not meet the other two criteria, it is non-negotiable.

Items falling within the required category include wages, hours, fringe benefits, and physical facilities for employees. In addition, procedures for evaluation, assignment, and promotion are required topics of bargaining.¹⁴

A school board *must* bargain upon demand concerning all required topics for negotiations, and cannot make changes in required topics without negotiations.

Illegal topics are all matters which do not pass this three-factor test. Either they do not "intimately and directly affect employees" (for example, the use of standardized tests to evaluate students), or they do intimately and directly affect employees, *but* a negotiated agreement on such matters would significantly affect management rights. Transfer decisions have an important impact on the affected employees; nonetheless, they are illegal topics because a negotiated agreement limiting a school board's right to transfer employees would significantly interfere in the board's ability to operate its schools effectively. Other examples of illegal topics include class size, curriculum, textbook selection, and the criteria for evaluations and promotions.¹⁵

Illegal topics also encompass all matters that a statute or regulation mandates. No local board may negotiate a clause that violates a state statute or regulation. Statutory benefits for teachers, such as a minimum of 10 days sick leave per year and the teachers' right to attend the New

¹²A limited permissive category of bargaining exists for police and firefighters under Chapter 85, Public Laws of 1977. See *Paterson Police PBA, Local No. 1 v. City of Paterson*, 87 N.J. 78 (1981).

¹³*Local 195, IFPTE, AFL-CIO v. State of New Jersey*, 88 N.J. 404 (1982).

¹⁴See Garry M. Whalen *et al.*, *Negotiations 1983* (Trenton, N.J.: New Jersey School Boards Association, 1982) p. 5

¹⁵*Ibid.*

Jersey Education Association Annual Convention without loss of pay,¹⁶ are therefore illegal topics for negotiations, as matters outside the scope of bargaining.

A school board has no authority to negotiate illegal union demands. An illegal topic that the parties include in their agreement is invalid and unenforceable. PERC determines which union demands and contract clauses are illegal.¹⁷ Should PERC find a demand or contract provision illegal, PERC will order the union to stop demanding negotiations concerning that topic or will restrain arbitration of a grievance seeking enforcement of that clause.

DUTY TO BARGAIN IN GOOD FAITH

The purpose of the public sector labor law is to facilitate voluntary settlements; therefore, the law must require the parties to bargain in a manner that will fulfill this purpose. This obligation is called "the duty to bargain in good faith." It is the cornerstone of any collective negotiations law.

Bargaining in good faith is usually judged by a legal standard known as the *totality of conduct* test.¹⁸ Employers and unions both have an obligation to bargain in good faith; however, unions file most refusal to bargain charges against employers as a tactic to pressure the employer to make a better offer.

PERC will ask these questions to determine whether a school board has bargained in bad faith.

- Was the board willing to meet at reasonable times?
- Did the board approach negotiations with an open-mind, accessible to persuasion?
- Did the board freely partake in discussions about required topics for negotiations that the union brought to the bargaining table?
- Did the board follow procedures conducive to settlement, such as mediation and factfinding?

PERC must make a judgment in determining if a party has refused to bargain in good faith, based on the "totality of conduct" test. If the union files an unfair practice charge alleging bad faith bargaining, PERC must evaluate the school board's attitude in the negotiations process. The union carries a very difficult burden to prove such an allegation, because

¹⁶N.J.S.A. 18A:30-2; N.J.S.A. 18A:31-2.

¹⁷*The Public Employment Relations Law*, pp. 47-67.

¹⁸*State of New Jersey v. Council of New Jersey State College Locals*, 141 N.J. Super. 470 (App. Div., 1976).

bargaining in good faith does not mean that either party must make a concession on any particular issue. Hard bargaining, such as the board's refusing to improve a reasonable offer, or insisting upon a union concession, is perfectly legal. This attitude is neither anti-union, nor anti-teacher, nor anti-collective negotiations. Should a school board make a final offer too early in negotiations and then flatly refuse to discuss or consider modifications to that offer, PERC may find that the board bargained in bad faith. But a board that refuses to compromise on any particular issue is still bargaining in good faith, as long as it meets the requirements of good faith bargaining outlined earlier.

STRIKES

Public employees have no inherent or constitutional right to strike in New Jersey; this right can only be granted by an act of the State Legislature.¹⁹ The public employer can request that the courts enjoin illegal strikes. Should the union, its officers and members, refuse to obey a court order to end a strike, the judge may find them in contempt of court, and subject them to fines. The judge may also imprison union officers and supporters who violate his order to cease their illegal actions.²⁰

SUMMARY

The PERC law merely establishes the rules of conduct for negotiations. It is generally unconcerned about negotiations outcomes, except where the parties have agreed to illegal topics of bargaining; consequently, the law does not protect school boards and school districts. The major protector of school boards during negotiations is smart, hard bargaining. And smart, hard bargaining assumes an understanding of the legal framework outlined in this chapter.

¹⁹*Board of Education of Union Beach v. New Jersey Education Association et al.*, 53 N.J. 29 (1968).

²⁰See Chapter 12, "Teachers' Strikes", pp. 118-119

THE BOARD'S NEGOTIATING TEAM

4

INTRODUCTION

The board president ordinarily assigns certain board members to the negotiating team, based upon their experiences, interests and other commitments. Unlike other committee assignments, this particular assignment can be extremely time-consuming and pressure-filled. Team members should be patient, available, experienced, and even-tempered. These characteristics will not only help them in their dealings with the union but also help them work with other board members. Board negotiators must also be prepared to accept a thankless job, for which credit is rare and blame is common.

SELECTING THE TEAM

Bargaining, like most board activities, is generally handled by the personnel or negotiations *committee*, also known as the bargaining team. The board president selects the negotiating team members, who should represent a minority of the full board. A committee or team is preferable to the full board because:

- bargaining involves a large commitment of time; a board that assigns a majority of members to negotiate would have difficulty staffing its other committees;
- a negotiations committee is generally obliged to argue in favor of and to vote for the tentatively approved agreement; should a majority of board members serve on the committee and are therefore obliged to vote for the tentative agreement, the formal ratification vote by the full board would be a sham; obviously, a majority would already be committed to the settlement; a team comprised of a majority of the board, therefore, may constitute a waiver of the full board's right to ratify or reject the tentative agreement; and,
- a board committee comprised of a majority of the board would have all the obligations of the Open Public Meetings Act regarding announcing and advertising meetings, certainly an unneeded complication.

Some school boards have two separate committees: personnel and negotiations. The personnel committee may handle grievances, new hirings, etc., while the negotiations committee concerns itself with bargaining the district's employee contracts.

Some boards believe that a committee that handles grievances should not handle negotiations. Their position is that a committee assuming both roles may find animosities building among the committee members and their union counterparts. For example, grievance processing may create animosities that could spill over into negotiations.

In contrast, some boards prefer one committee to do both tasks. These boards believe that the two tasks of grievance processing and negotiations are closely interrelated. A committee processing grievances could directly use that experience and knowledge to deal with negotiations issues.¹

THE AUTHORITY OF THE BARGAINING TEAM

The board team should have enough authority to permit it to engage in good faith negotiations. The team is more than a messenger carrying every proposal and counterproposal back to the full board for discussion and review. The team should have the authority to receive, discuss, modify, and tentatively agree to the union's proposals. The team should be able to make proposals of its own, and compromise on those proposals, if needed.

The authority of the committee must be *limited*. The team should be only allowed to reach a *tentative agreement* subject to the full board's review and ratification or rejection.

PERC has held that the *board does not have the inherent right* to review the tentative agreement. The board could waive this right, should it not *expressly retain* it. A negotiating team that does not inform the union that it has only limited authority to negotiate a tentative agreement can inadvertently bind the full board to that agreement. This principle also applies to the union team.²

The team can avoid an unintentional waiver as long as it informs the union, in writing, at the beginning of negotiations that it does not have the power to bind the full board, and that the team will have to submit the tentatively-approved agreement to the full board for its approval or rejection. The following letter would satisfy the board's obligation:

¹Marc Gaswirth, "The Board President and Labor Relations," *Handbook of Effective Board Leadership*, (Trenton, N.J.: New Jersey School Boards Association, 1987).

²In re Bergenfield Board of Education, PERC No. 90, 1 NJPER 44.

The Board of Education has selected the following individuals to be members of the Negotiating Committee of the Board:

(insert names)

The Board hereby authorizes this Committee to enter into negotiations with (enter name of the union) concerning a successor contract for the next school year for the unit which includes all (list the job classifications in the contract).

The Negotiating Committee is directed to negotiate in good faith on all terms and conditions of employment relating to a successor contract. The Board of Education reserves to itself the final authority to review, ratify or reject any tentative agreement reached by the Negotiating Committee of the Board.

The bargaining team's authority rests with the team as a whole. A team member has no authority to make commitments to the union without the knowledge and consent of the full team. Likewise, a board member who is not on the team should never engage in discussions, no matter how "informal" or "off-the-record," with employees or union representatives about the negotiations issues.

Union representatives commonly approach individual board members whom they perceive as friendly, weak, or otherwise susceptible to persuasion, and request a "heart-to-heart" talk when negotiations get difficult. Board members should reject union attempts to go around the board's negotiators, otherwise known as an "end run." Individual board members should tell the inquiring employee or union representative that, as an individual board member, he or she lacks the legal authority to discuss matters currently the subject of collective negotiations.

The full board determines the limits of the team's authority. The team commonly receives a package of union proposals, and reviews the most important ones with the full board. The board then establishes "guidelines" which give the team its limitations and authority; for example, a board might approve a certain maximum increase in total compensation and certain changes in personal leave usage, but flatly reject binding grievance arbitration and agency shop.

After the board has established the settlement guidelines, the team bargains with the power to tentatively agree to union proposals that fall within those guidelines. The team should periodically report to the full board about the status of negotiations. It may also request changes in the board's guidelines should the original limits be too restrictive to reach settlement; however, without such approval *the team has no authority to go beyond the limitations that the full board has set.*

After the parties have reached a tentative agreement, the team returns the agreement for the full board's review, and ratification or rejection. If the team has kept the board informed of the progress of negotiations, and has stayed within the board's guidelines, a majority of the board should ratify the tentative agreement. Team members have an obligation to support and vote for the tentative agreement. An exception exists. A

team member who indicates his opposition to the tentative agreement at the time of settlement may vote against it. The full board always has the freedom to reject the tentative agreement, but the board should avoid this result, whenever possible. It is bad for the negotiations process, and does not inspire the union's trust in the board's bargaining team in the future.

THE MAKING OF A GOOD TEAM MEMBER

Certain personal characteristics tend to make a board member an effective negotiator. They include, among others, patience, availability, experience, and even-temperedness.

Patience. Negotiations can be a very boring and frustrating process. An individual who does not have the patience to listen attentively for hours to petty complaints and self-serving arguments will not like negotiations. Likewise, an individual who has a short temper that is quickly ignited by innuendos attacking the competency, intelligence and good will of board members and administrators should ask for a different committee assignment.

Because bargaining entails much tedious work, patience is a prerequisite. Board negotiators may spend hours working out the writing of new language or developing new salary guides.

Bargaining is also a complex process involving the personal needs and egos of each team's members as well as the political goals of the parties, particularly the union. These personal and political considerations may be as important as the substantive issues at the table. An individual will not be an effective negotiator, if he does not have the patience to sit quietly while the union raises and defends specious arguments, and blatantly ignores or obfuscates the truth.

Time is a critical factor in reaching a negotiated agreement. Negotiations cannot be rushed; therefore, patience becomes an extremely important quality of any good negotiator: patience to hear the other side out, because "sounding off" may be that party's only real need on certain issues; and patience to wait for the moment when the team can obtain the best deal for the board.

Availability. Most teacher union negotiations extend six months or longer and commonly include a dozen meetings. Should the board team simultaneously negotiate other contracts, this time commitment is even greater. Personal commitments will make it impossible for some board members to attend numerous negotiating sessions. These members should not serve on the team because it would be a disservice to the board, and their contribution, if any, will be limited.

Prior Experience. Some board members profess to be experts in negotiations, even though their negotiations experiences have been in

retail or commercial sales or in real estate transactions.

Certain skills are transferable from business negotiations to labor negotiations, particularly the verbal skills examined in Chapter 9; however, most labor relations professionals believe that the differences between labor negotiations and business negotiations are more significant than the similarities.

The major difference is that the labor-management relationship is a *permanent* one. Parties to a business transaction who fail to agree on the price will each search for someone else who can meet their needs. A teachers' union and school board that fail to agree are still stuck with each other, and they must continue to seek a settlement.

The permanence of the labor-management relationship has many implications for the types of demands made, the tactics employed, and the options if settlement does not come quickly. The internal politics of each party and the public's needs further differentiate collective negotiations from commercial negotiations. For these reasons, the board team should have a member experienced in *labor negotiations*. That experience should be with management, but a private sector trade unionist, for example, who takes his school board responsibilities seriously can also be a very effective team member.

A question commonly asked is, "Should a board member who is a teacher in another district be on the board's bargaining team?"

The answer is yes and no. The teacher who is a board member must realize that local teachers might perceive him as a "soft touch," compared to the rest of the board. Local teachers may privately approach that individual for those "heart-to-heart" discussions mentioned earlier. The pressure to engage in such discussions, and to concede to certain substantive union demands for the sake of "solidarity" with the profession, may be enormous. And, should this person reject these requests, the union's reaction may be more heated than it would be towards another board member in the same situation. The union often expects more from the teacher/board member, believing that these mixed loyalties can tear apart this person, and make him eventually succumb to the union's interests. In some negotiations disputes, a union has picketed the school where a board member taught to encourage the teachers in that school to pressure that teacher/board member to "cooperate" with the union in the district where he serves as a board member.

Some teachers who are board members can be effective board negotiators. They can withstand the pressure and serve admirably on the bargaining team in their home district. But many have determined that, for the sake of the district as well as themselves, it is wiser that they not directly participate in teacher negotiations, except for their role in the ratification process.

A board member whose spouse or close relative is an employee in the district should not be involved in negotiations affecting that individual.

Some board members who have close relatives or friends who are employees in their districts choose not to negotiate at all, because the terms of one negotiated agreement may affect those of another agreement in the district.

Even-Temperedness. The bargaining process involves the attempt to increase the acceptability of one side's position while decreasing the other side's commitment to a contrary position. It does not help to aggravate your opponent. Hostile remarks and actions tend to force the other negotiator to dig in his heels and defend his position with even greater zeal. Even the most persuasive arguments are hurt if they are delivered in a threatening, coercive tone.

The board president should avoid appointing the most hostile, anti-teacher board members to the negotiating team. Their presence will likely make negotiations more difficult and more unpleasant, and will not necessarily aid the district to reach a desired settlement. Bad feelings that develop during such unpleasant negotiations will often carry over into the day-to-day labor-management relationship, to the detriment of both parties.

THE CHIEF SPOKESPERSON

ideally, all of the previous qualities of the school board negotiator should be doubly present in the chief spokesperson; at least, they should be present to some degree. In addition, the spokesperson must have the complete trust of the board and the union. Should either party believe that the spokesperson is less than honest or competent, his effectiveness will be limited considerably. The board will begin to second-guess his actions, and some board members will be greatly tempted to deal directly with teachers or the union to get the "straight scoop" about negotiations. The resulting lack of unity on the board's part increases the union's bargaining power, to the district's disadvantage.

The credibility issue becomes critical. The union will not always be sure when the board's negotiator is being truthful; therefore, it will be most reluctant to expose its true position fearing that the board's negotiator will take unfair advantage of this information. A board spokesperson that the union perceives as untrustworthy forces the union to be more cautious in its movements and less frank in its discussions.

The board's chief spokesperson must also be tough enough to be able to say "no" to the union without apologies, when it is necessary to do so. The spokesperson should not display timidity, because he will encourage the union to renew its pressure for the concession being discussed.

The ability to say "no" firmly and convincingly should not be confused with a hostile response. Hostility will usually engender an identical, rather than a positive response. A board negotiator who says "no," followed by

a reasoned explanation and delivered in a dispassionate manner shows that he objectively considered the union's concerns. This type of response has nothing to do with hostility. But it still gives the union a clear message that further discussion on the matter will be fruitless. The union then must decide to either continue the unproductive discussion, drop its demand completely, or modify its position to meet the district's concerns.

The chief spokesperson should be the only person speaking at the bargaining table. Other team members should speak only when the spokesperson gives them permission, and then only if the spokesperson has approved of what they are going to say.

This tight control over communications is necessary to ensure that the team members do not divulge information to the other side that will hurt the board's position. Also, the team members should not send confusing signals. This can occur when different board members make slightly different statements on the same issue. Finally, a lack of control over communications may reveal a divided board team. The union will seek to exploit this divisiveness and place pressure on the board member or faction most sympathetic to its position.

To balance the spokesperson's exclusive right to speak, the rest of the team should have the right to call a caucus at any time. This is best done through a note that a team member may pass one or two minutes *after* the incident giving rise to the desire to caucus. A team member who passes a note immediately following the incident may unintentionally expose his position or concern.

Although direct bargaining requires that team members remain silent at the table, caucuses should involve open and frank discussions among the team members. The spokesperson and the rest of the team must know how far each member is willing to go on each issue. The team may benefit from a member's analysis and opinion, especially on issues where he has technical expertise or personal insight concerning the effect of agreement on the district and community. It is much better to spend a lot of time in caucus discussing the issues and forging a consensus than to spend a lot of time at the table making mistakes.

RESPONSIBILITIES OF THE OTHER TEAM MEMBERS

The team members not serving as the spokesperson may have certain assignments. Many board members bring special skills to the bargaining team that can be helpful in the evaluation of union proposals. People with backgrounds in education and business, for instance, may be assigned to analyze and cost out certain union demands and should do so willingly and to the best of their ability.

The team "recordkeeper" or "note taker" is responsible for recording who said what and when. The team needs these notes to keep track of

concessions, trade-offs and the withdrawal of proposals, to prevent old issues that obstruct agreement from reappearing. These notes also may show that the union has subtly changed its position on an issue. A union demand for "binding arbitration at any cost" that changes to "we need some sort of outside forum for grievances" may mean that advisory arbitration is what the union now wants. Good notes will help to reveal these changes in position.

The team "observer" spends his time watching the nonverbal expressions of the union's team members. He may record when a union negotiator passes a note, raises an eyebrow, or shows unusual interest. This information may provide valuable hints concerning the union's priorities.

Every board negotiating team should have someone who can do the necessary financial calculations. The board secretary/business administrator or a board member with experience may be the appropriate individual for this important task.

The chief school administrator's proper role in negotiations is to serve the board as a resource person. The administrator's assistance is essential during the preparation stage.³ He may or may not sit at the table, but he should always be available during negotiations, to supply information to the board team and to react to union proposals and counterproposals in terms of their effect on the administration of the school district.

The chief school administrator should *not* ordinarily serve as chief spokesperson for the board. He is an educational leader, and performs his administrative work as much by *leading* his staff as by *ordering* them. An administrator who wears the hat of the tough negotiator at night, and then has to wear the hat of the educational team leader the following morning may be in a difficult, if not impossible, position. In addition, the drain on his time and energy may detract from his efforts in other areas.

Some districts use an assistant superintendent for personnel or a director of employee relations to lead their negotiations effort. This person has primary responsibilities in negotiations, grievance handling, and other labor and employee relations matters. He also has intimate knowledge of the district, and has the technical skills of the negotiator to do an effective job. Furthermore, he generally has few of the educational leadership responsibilities (curriculum, staff evaluation, etc.) that a superintendent or principal has.

PROFESSIONAL NEGOTIATORS

The value of a professional negotiator can be seen in a number of ways.

³The role of the chief school administrator in preparing for negotiations is examined at length in Chapter 5 "Analyzing the Current Agreement."

First, the professional brings immediate expertise concerning bargaining strategy, contract language and costing out union proposals. Second, he helps to assess the school district's overall objectives. Although a management advocate, a professional's objectivity regarding realistic bargaining expectations could be most helpful, and may strengthen a school board's negotiating position; his advice might make the board concentrate on the "possible." Third, a professional allows school managers to concentrate on their normal duties, rather than attend to the laborious tasks and time commitments associated with negotiations. Fourth, a professional negotiator can absorb the punishments that the union or local teachers sometimes mete out to school board members during negotiations. This may allow personnel relations after settlement to go more smoothly. When professionals leave a district, they often take much of the hostility generated during bargaining with them. Finally, a professional is a resource person from whom administrative staff can develop their own level of competence.

Not all school boards feel the need to hire an outside professional negotiator. If the board-union relationship is informal, friendly and productive, then a board may not need a professional negotiator. In fact, only 27 percent of New Jersey's school districts used professional negotiators during negotiations for the 1981-82 contract year. Another 11 percent used their school board attorney. Three percent used a staff labor relations specialist, and three percent used their school superintendent. A majority of boards (56 percent), however, continue to use either a board member or the board president.⁴

Most boards *should* use a professional negotiator. The outcomes of collective negotiations are too critical to efficient school district operations, in terms of cost and administrative discretion, to place this responsibility in the hands of lay school board members.

As a school district assesses whether it could benefit by using a labor relations specialist, here are some considerations it should address.

- Have negotiations been unusually long and difficult, negatively affecting the day-to-day relations between staff and administration?
- Have district staff and board members spent excessive time in negotiations at the expense of other responsibilities?
- Does the board team believe, following negotiations, that a better contract could have been reached had certain mistakes been avoided?
- Does an outside negotiator or a district employee with many years of negotiating experience lead the union team?

⁴Esther R. Strassman, *An Analysis of Teachers' Contracts in New Jersey 1981-82/1982-83* (Trenton, N.J.: New Jersey School Boards Association, 1982), pp. 15-16.

- Has the recent grievance and arbitration history shown an increase in employee dissatisfaction?
- Does the existing contract require significant revisions in contract language which would improve school management?

The answers to these questions will suggest whether the district should consider hiring a negotiations specialist. Should there be a need, then the next step is to find an individual or firm that best suits that district.

Contracting for the services of a professional negotiator is, in many ways, similar to deciding to use a particular physician or attorney. Much depends not only upon his demonstrated skills and abilities, but also upon his ability to understand and relate to a client.

There are two basic types of professional negotiators: attorneys and non-attorneys. They may either work for themselves or for a firm, the latter being a more common arrangement. A school board should not necessarily reject one type of negotiator in preference for another until it conducts further inquiries and interviews.⁵

A good preliminary screening of candidates is important. A district representative could call the candidate's current clients. This will enable the board to assess better their own need for an outside professional. The representative should ask questions that focus on the professional's negotiating style, billing procedures, personality, responsiveness, and, of course, results. This screening should narrow the field of candidates so that the school board spends no unnecessary time interviewing firms or individuals that it has already prejudged as unacceptable.⁶

A school board should ask the following questions when interviewing a professional negotiator:

• **What is the range of services that you offer?**

Analysis of current contract
 Analysis of union proposals
 Drafting of counterproposals
 Mediation and factfinding
 Review of tentative agreement
 PERC representation

⁵The NJSBA Labor Relations Department will provide school boards, upon request, with the names of professional negotiators currently representing school districts in New Jersey. Using either this list or another source, a school district could request from any number of professional negotiators the names of the school districts that they currently represent or have represented. The Department neither recommends nor endorses particular negotiators.

⁶All professional negotiators gain and lose clients for many, sometimes complex, reasons. School board members should not summarily reject a candidate on the basis of lost clients without probing first for the reasons and the circumstances.

Other litigation

In-service program for administrative staff

- **What are your fees and billing procedures?**

Hourly rate or retainer or both

Expenses and travel

Billing procedures

Reasonable estimate of total costs for purposes of district budgeting

- **What is the board's role in the negotiations process?**

Selection of board negotiating team

Development of guidelines

Update meetings

- **Who will do the negotiating?**

The interviewee or other members of the firm

Board member participation in the actual negotiations

- **How busy are you?**

Timely response to phone calls

Availability for meetings and bargaining sessions

Once the board decides to hire a professional, it must determine what its appropriate relationship will be to the professional negotiator. First, the professional has been hired for his expertise and bargaining skills. Second, he works for the school board. He does not impose his standards on a local school board. But a reasonable balance must be struck between the flexibility that a professional requires to do his job effectively and the interests that the school board wishes to protect.

Board members must recognize, at the outset of bargaining, that all their proposals realistically cannot be entirely incorporated into the next contract. It would be unimaginable that the board would agree to adopt, without change, the entire union package; likewise, it would be unreasonable to expect the union to accept, without qualifications, all the board's proposals.

School boards should not expect their professional negotiators to perform miracles, but they should expect them to get results that will improve the operations of the school district. School boards should not handcuff these experts and demand that they get everything and give nothing. Should that occur, the professional will accomplish very little.

The negotiations specialist is working for the school district, and requires its continued support to perform effectively. *A school board should avoid any temptation to undercut its professional negotiator; for example, some boards have dealt directly with the union without the profes-*

sional's knowledge, while other boards have made overtures of one sort or another in an effort to arrive at a quick settlement. These efforts, however well-intentioned, are doomed to failure and seriously damage the professional's credibility with the union.

Should the district hire a professional negotiator, it might consider whether the time is right to remove board members completely from the bargaining process. After the full board has established settlement guidelines, board members may not be needed at the table. A negotiating team consisting of the professional negotiator, the business administrator and a building principal or chief school administrator may be sufficient. This team would report frequently to the board's employee relations committee, and to the full board, as needed.

Such an arrangement allows the board members to attend to their policy-making functions. If achieving a contract within the established guidelines is basically an administrative task, then it might be appropriate to leave that task solely in the hands of the negotiator and district administrators. This protects board members from the pressure to concede that frequently arises in the heat of negotiations. It also limits the temptation of some team members who attempt to discuss the issues or reach settlement away from the table.

SUMMARY

The board's negotiating team or committee should be comprised of a *minority* of the full board. The members should represent the thinking of the entire board concerning bargaining outcomes. The board president selects the team members, including the chairperson. But the full board generally determines the team's authority to settle a tentative agreement, subject to the full board's final action. Team members should possess the characteristics of good negotiators, including patience, availability, experience in labor relations, calmness, etc. The team's chief spokesperson may be either a team member, the board attorney, the superintendent or other staff labor relations specialist, or an outside professional. The board negotiator's responsibility is time-consuming and pressure filled; nonetheless, it is a responsibility that many board members assume, with a strong commitment to the district's interests and with unselfishness toward their own.

ANALYZING THE CURRENT AGREEMENT

5

INTRODUCTION

The long hours of preparation involve considerable time and effort and a major part of the preparation effort involves an analysis of the current negotiated agreement, where the board and its administration determine those areas of the agreement that are in need of change, those in need of retention, and those in need of introduction.

THE ROLE OF BUILDING-LEVEL ADMINISTRATORS AND SUPERVISORS

Building-level administrators and supervisors are probably the best source of first-hand information about the current agreement. After all, they live with the contract daily, and their experiences are important sources of information that a school board should have before it begins bargaining.

The value of their input should be obvious to all school board negotiators.

- Principals and supervisors know the *applied* meaning of the contract language. They know how it affects the employees they supervise and how employees and the union have interpreted that language. A board demand for a change in existing contract language might be misplaced, if the reason for the change is based on an incorrect assumption that the language is unclear or needs strengthening. Principals and supervisors might reveal that the contract language is accomplishing its desired purpose and that no change is necessary. For example, the district's interpretation and application of the personal leave provision may have prevailed under previous agreements. Any attempt to tamper with it may force the board to concede in an area where a concession was not needed.
- Principals and supervisors know which contract clauses are important to employees and the union by the way in which the union monitors these clauses. The board needs this information

because the board might give more attention to modifying contract language that the union frequently uses to justify its grievances. The union may regard the tuition reimbursement and personal leave provisions as sacrosanct, and thus vigilantly protect its strong interest in these areas. On the other hand, the union may overlook other clauses, like posting procedures and after-school conferences. School boards should know this information for its tactical value alone.

- Principals and supervisors often know which sections of the contract are consistently abridged with no complaint or reaction by either side. The length of after-school faculty meetings or parent-teacher conferences may be examples; therefore, the board may not need to raise these issues in bargaining.
- Principals and supervisors often know their employees' concerns better than anyone else in management; therefore, they can better predict whether these concerns might eventually translate into union proposals. A school board aware in advance of likely union demands can prepare its defense accordingly. An anticipated union demand for an increase in the number of sabbatical leaves enables the board to investigate adequately the current situation and respond accordingly. In other words, *the fewer the surprises, the better.*
- Principals and supervisors may know the local union leadership better than anyone else in management and can assess its level of support, its ability to lead, and the degree to which its interests are compatible or at odds with those of the district's employees. This point is critical in gauging the level of membership support for any particular demand. Equally critical is foreknowledge of the employees' willingness to follow the union's directives to participate in collective action, such as a job action or strike. Principals and supervisors may be particularly useful in this context.
- Finally, principals and supervisors know what they need to administer the district's educational system. They know which contract language or practice is giving them problems. They also know what contract language changes are necessary to allow them to more effectively do their jobs. Personal day usage, committee meetings, and notification provisions are often difficult problems for building administrators. They may be unable to deny requests for personal leave because the agreement or the practice obligates them to grant personal day requests even though they are made in disregard for the needs of students or for the ability of the district to secure substitutes for absent teachers. The frequency of committee meetings and unreasonable notice requirements concerning assignments may impose an administrative burden. The board should make sure that the principals and supervisors, through the chief school administrator, identify these problems and offer suggestions of how they might be corrected.

A school board, through its superintendent, should insist that administrators and principals get involved in the preparation phase of bargaining and remain involved, in a continuing consultative role, throughout the process. The size and the organization of each school system should determine how this may be accomplished. At a minimum, administrators and principals should complete a questionnaire or survey form indicating changes they desire in the existing agreement. These proposed changes could be more fully developed at a general meeting or in individual meetings with the superintendent, who would then relay this information to the board's negotiating team. This process should begin well in advance of the start of negotiations for a successor agreement.

This approach assumes that a board views its administrators and supervisors as part of the management team. The fact that these same individuals also bargain collectively with their school board would appear to create a possible conflict; nonetheless, a school board should not ignore its administrators and supervisors in negotiations. The board's objective should be to make middle and upper-level school managers more effective. This can be done by removing unreasonable restraints that negotiated agreements impose on these managers.

COSTING OUT THE PRESENT AGREEMENT

School board members are aware, of course, of the existence of negotiated labor agreements. But they often are not as aware of the cost of these agreements.¹ The cost should become more than apparent in the preparation phase of bargaining. The school administration should break down employees' current compensation and fringe benefit package into its component parts. The board negotiators should then review data that the school administration has prepared and analyzed. These data should contain information about current salaries and negotiated benefits, such as medical/hospitalization coverage, dental programs, prescription plans, personal days, sick days, professional days, accumulated sick leave payout, tuition reimbursement, and sabbatical leaves.

A scattergram is the single most important source of information about salaries and their distribution. It describes in great detail the number of staff on guide, the cost per salary column, the total cost of salaries, etc. Some simple additional arithmetic will disclose the average teachers' salaries. A second scattergram for the upcoming school year, the year for which a new contract is being negotiated, will determine the cost of the increment alone.

The Board Secretary/School Business Administrator could do a cost

¹An excellent source for determining the cost of employee benefits is Curt Wary's, *Costing Out the Labor Agreement* (Trenton, N.J.: New Jersey School Boards Association, 1982).

analysis of the various health plans. Boards that pay the full premiums for medical/hospitalization coverage and for other types of plans, like dental or prescription drug, must anticipate rate increases in much the same way as they anticipate the cost of the salary increments.

Likewise, a district official should analyze personal, sick, and professional day usage to determine the frequency of each type of paid day off that employees take. In addition, that official should include the costs of substitute coverage in connection with the granting of those days off. The impact of employees taking those days at certain times during the school year may also be a serious administrative concern.

Other benefits, like accumulated sick leave payout, tuition reimbursement, and sabbatical leave, also have price tags. The board's negotiators should know this information in advance of the first bargaining session to counter any union arguments to retain or expand these benefits.

The costing out of employees' benefits under the existing agreement is an absolutely necessary step. It is very difficult to know what, if anything else, the parties can negotiate unless the board knows what it has already negotiated. The costing out process continues throughout bargaining.

Many districts have regretted their failure to cost out both the direct and indirect costs of union demands to which they have eventually agreed. For example, the granting of a liberal tuition reimbursement allowance to employees has a direct cost to the district. This allowance also has an indirect cost. It encourages employees to move laterally on the salary guide, which costs the district more money in the long run.

Most negotiated benefits have a direct financial cost; some have an indirect financial impact on districts; still others are administratively troublesome.

EVALUATION OF GRIEVANCE HISTORY

Another useful way of analyzing the current agreement involves an evaluation of the district's grievance and arbitration experience. Employees and their unions file grievances for a variety of reasons. Some grievances are clearly frivolous; however, others may underscore serious contract language and past practice problems.

The extent to which grievances are processed through some or all of the steps of the negotiated procedure may reveal whether the union implicitly accepts the board's interpretation of the language it is grieving; moreover, an arbitrated grievance points to a more serious problem of contract language interpretation. A board that loses an arbitration decision may seek to negotiate a change in the contract language that gave rise to that grievance.

Districts would be well advised to identify all grievances and analyze them in a number of ways, including by topic (personal days, sick days),

by contract clauses allegedly being violated, by manner of resolution (board level, arbitration) and by the resolution itself (arbitration award). The board can then see what contract problems exist and how they might deal with them in bargaining.

AMBIGUOUS, CONFLICTING, AND OBSTRUCTIVE LANGUAGE

Many contracts contain ambiguous or unclear contract language. Expressions such as "Somewhat equally," "Whenever practicable," "As soon as possible," are some examples of ambiguous phrases that could give rise to grievances.

Occasionally, one clause could conflict with another clause, even though the meaning of each clause is clear. For example, a contract clause requiring all teachers to teach five periods a day apparently contradicts another contract clause requiring English teachers to teach only four classes a day.

Obstructive language is also commonplace in many agreements. This language may create constant administrative problems involving, for instance, the teachers' right to take personal days without restrictions and to leave the school building without notice or permission. In addition, undersirable paraphrases of statutes may grant a benefit beyond what the statute being paraphrased grants.

Board members should review ambiguous, conflicting, and obstructive language and consider either modifying or removing it in negotiations.

ILLEGAL TOPICS OF BARGAINING

In August, 1978, the New Jersey Supreme Court, in the *Ridgefield Park* ruling, struck down the permissive category of negotiations.² This decision makes all formerly permissive topics illegal and unenforceable. School boards that have not done so already should review their agreements to determine which, if any, formerly permissive clauses they should remove from their agreements.³

Likewise, other clauses may be illegal because they either conflict with or are preempted by statutes, rules or regulations. Should they be present

²*Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 N.J. 144 (1978).

³The NJSBA's Labor Relations Department annually issues a publication that identifies subjects that are either mandatory or illegal topics of bargaining. See Garry M. Whalen *et al.*, *Negotiations 1983*, Trenton, N.J.: New Jersey School Boards Association, 1982). In addition, the Department prepares an *Index and Analysis of PERC Decisions*, which can be obtained on a subscription basis.

in the agreement, they, like the former permissive topics, should be deleted either voluntarily by the parties in negotiations or by legal action that the board initiates. This legal action begins with the filing of a scope of negotiations petition with PERC, which will determine if the issue in dispute is outside the legal scope of bargaining.

SUMMARY

The analysis of the current agreement involves five basic steps. The first step requires school administrators and supervisors to review the existing contract and to make appropriate recommendations. The second step costs out benefits that employees currently receive. The third step identifies administrative problems. The fourth step examines the district's grievance and arbitration experience. And the final step carefully reviews the language of various contract clauses. After the board has taken these steps, it is in an excellent position to move to the next task—analyzing union demands.

ANALYZING UNION DEMANDS

6

INTRODUCTION

The preparation phase of bargaining would be incomplete without a careful analysis of union demands. School district negotiators who know what the union believes is important have a clear advantage for two reasons. First, this information considerably reduces the amount of uncertainty permeating the bargaining atmosphere. Second, it enables a school board to focus its attention on real rather than cosmetic issues.

ORIGIN OF UNION DEMANDS

Union demands originate from many sources, including the six discussed in this section.

Legislation, Regulations, Court and Administrative Agency Decisions

Union demands commonly stem from legislative and regulatory acts as well as from judicial and administrative agency decisions. The impact of these acts and decisions may vary from district to district. An overall increase in certain demands is generally associated with an act or decision expanding the scope of bargaining while a noticeable decline in other union demands usually follows the narrowing of the scope of bargaining. Specific union demands, thus, can be linked to this expansion or contraction of the scope of bargaining.

Because the law establishes the general framework in which bargaining occurs, any changes or proposed changes in the law may dramatically affect union demands. The bargaining law, first passed in 1968, was amended in 1974 and again in 1977.¹ In 1978, a state Supreme Court decision substantially narrowed the legal scope of bargaining in New Jersey and along with it, the number and type of union demands that could be

¹Chapter 303, Public Laws of 1968; Chapter 123, Public Laws of 1974, and Chapter 85, Public Laws of 1977.

legally negotiated.² Union efforts to expand the scope of bargaining so far have met with only limited success.

In 1980, the Agency Shop law was passed. Immediately after it took effect, many unions sought to negotiate Agency Shop proposals.³ This legislative act gave strong impetus to union demands throughout the state to have non-union members pay a "fair share" to the majority bargaining representative. Prior to the passage of this law, the parties could not legally include such a provision in their negotiated agreement.⁴

Two years later, the bargaining law was further amended to provide for negotiations over certain disciplinary actions taken against public employees. But its effect on school board-employee bargaining is expected to be limited.⁵

Administrative rules and regulations may have a preemptive effect on collective negotiations and thus on the kind of union demands that the parties may negotiate. The preemptive effect of rules and regulations became apparent nearly two years after the state Board of Education promulgated regulations for the Evaluation of Tenured Teaching Staff Members, *N.J.A.C.* 6:3-1.21. A series of PERC decisions held that many procedural as well as substantive evaluation matters could not be negotiated because they are either in conflict with or have been superceded by the rules and regulations.⁶ These decisions have affected many union demands concerning matters such as evaluation techniques, notice of intent to observe, who may evaluate, etc.

The courts have been extremely active in deciding if union demands or existing contract clauses are legal subjects of bargaining. The state Supreme Court, for example, decided that retirement incentive plans, sub-contracting decisions, and the establishment of the school calendar are all outside the scope of bargaining.⁷ The Appellate Division ruled, on the

²*Ridgefield Park Education Association v. Ridgefield Park Board of Education*, 78 N.J. 144 (1978).

³Chapter 477, Public Laws of 1979.

⁴*New Jersey Turnpike Employees Union, Local 194 v. New Jersey Turnpike Authority*, 123 N.J. Super. 461.

⁵Chapter 103, Public Laws of 1982.

⁶*In re Bethlehem Township Board of Education*, PERC No. 80-5, 5 NJPER 10159; *In re Linden Board of Education*, PERC No. 80-6, 5 NJPER 10160; *In re Fairview Board of Education*, PERC No. 80-18, 5 NJPER 10193. The State Supreme Court recently affirmed the Bethlehem and Linden decisions in *Bethlehem Township Board of Education and Bethlehem Township Education Association*, *Linden Board of Education and Linden Education Association*, 91 N.J. 38 (1982).

⁷*Fair Lawn Education Association v. Fair Lawn Board of Education v. Teachers' Pension and Annuity Fund*, Division of Pensions, Department of Treasury, State of New Jersey, 78 N.J. 574 (1979); *In the Matter of Local 195 IFPTE, AFL-CIO and State of New Jersey/In the Matter of State of New Jersey and State Supervisory Employees Assn./In the Matter of State of New Jersey and New Jersey Civil Service Assn.* 88 N.J. 393 (1982); and *Burlington County Faculty Association v. Board of Trustees*, 64 N.J. 10 (1973).

other hand, that payment for accumulated sick leave is a mandatory topic of bargaining.⁸ These court decisions may change or reinforce the character of union demands that a school board has to contend with.

PERC hears and rules on scope of negotiation disputes subject to limitations imposed by the law or judicial interpretation.⁹ PERC has decided that the following matters, among many others, are within the required scope of bargaining: compensation, workload, personal leave, tuition reimbursement, preparation periods, salary guide placement, number of teaching periods. Negotiations proposals may be developed around any of these issues. In contrast, proposals governing class size, curriculum decisions, qualifications for employment, and staffing needs are improper because PERC has held and the courts have affirmed that these matters are not mandatory topics of bargaining.¹⁰

School boards, therefore, must analyze union demands in the context of the existing law, the regulatory scheme, and judicial and administrative agency rulings. Knowledgeable school board negotiators should determine what demands are proper subjects for bargaining, so they could devote more time and attention to them.

Grievance and Arbitration Experience

A district's grievance and arbitration experience may offer insight into certain union demands.¹¹ A union generally is concerned about meritless grievances and even more concerned about adverse arbitration decisions. A union that conceded on a grievance on salary guide placement might now demand a language change which would increase its chances of winning a similar grievance under the terms of a new contract. Unions commonly seek contract language changes in those areas in which they lost arbitration decisions; therefore, an arbitration loss that turned on the interpretation of "emergency personal business" might provoke a union demand to broaden the meaning of that phrase.

The grievance and arbitration history is thus important because it reveals the most recent experiences that the parties have had under the existing agreement. Renewed bargaining, particularly, presents an excellent opportunity for the union to correct language deficiencies which reduce the scope of benefits that the union desires.

The board must be skeptical of any union attempt to change existing

⁸Maywood Education Association v. Maywood Board of Education, 131 N.J. Super. 551 (Ch. Div. 1974).

⁹See Garry M. Whalen, Cathleen Otto, and Bruce Taylor, *The Public Employment Relations Law* (Trenton, N.J.: New Jersey School Boards Association, 1979), pp. 60-61.

¹⁰Garry M. Whalen et al. *Negotiations 1983* (Trenton, N.J.: New Jersey School Boards Association, 1982), pp. 5-6.

¹¹Chapter 5 outlines the role of administrators and supervisors in bargaining preparations. These individuals are especially good sources of information in this regard.

contract language. Those attempts could affect areas where the union has lost or dropped grievances, and are probably designed to reverse a situation that the board currently finds favorable. The board should force the union to justify its position to change the contract. Should the reason stem from a meritless grievance, the board should not concede unless the trade-off involved is equal to or greater than the advantage the board currently enjoys.

The converse is also true. Unions will be extremely reluctant to concede on proposed language changes that the board seeks, particularly if they stem from a union arbitration win. Unions view favorable arbitration awards, especially those with precedential value, as both a contract administration and a negotiations victory. Arbitration awards often give meaning to ambiguous contract language. An arbitrator who defines the term "professional day" to include virtually any reason falling under the broadest definition of the term is, in effect, rewriting the parties' agreement. The board may want to narrow that expansive definition, but may do so only in negotiations. This is certain to encounter union resistance.

A school district that has advisory arbitration in its agreement should be aware that a union may push hard to obtain binding arbitration. This "push" for binding arbitration often follows the district's refusal to agree to the terms of an advisory arbitration award that the union has won.

Past Negotiations Demands

Some union demands are "retreads" of previous demands which were not achieved in past negotiations. Board negotiators can quickly identify these "old" demands by reviewing the notes of past negotiations sessions. These notes, which may further reveal when each demand was finally withdrawn, would give the board team some indication of the relative importance of each union demand.

Union demands may reappear for several reasons. Some may become extremely important because circumstances have changed. The union may seek guaranteed preparation time to protect teachers' free time or to guarantee the jobs of teaching specialists in a district experiencing a declining enrollment. On the other hand, the union may place mere "throwaways" in the package, so that it may later withdraw them. The importance of any union demand, regardless of its familiarity to the board, of course, must be assessed in the context of the current negotiations.

Economic Trends

Initial salary demands reflect unrealistic expectations, and will always be higher than the current inflation rate. These demands invariably are requests for more than the other side is expected to give.

During periods of high inflation, salary expectations are correspondingly higher. Money becomes very important to most employees. Should

the inflation rate decline, union expectations will also decline, but not necessarily in direct relation to the drop in the inflation rate. A union often claims that a lower inflation rate should not determine future salary increases because other factors such as comparability and the previous year's settlements, particularly if they were higher, are equally important.

Unions are naturally interested in salary increases pegged to changes in the Consumer Price Index (CPI) during periods of higher inflation, but oppose them during periods of lower inflation. The ebb and flow of the economic waters make it difficult to precisely analyze union salary demands. Ordinarily, it takes time to determine what the union's real "expectations" are. These may not become apparent until the settlement pattern emerges in neighboring districts.

Comparability

No school district in New Jersey negotiates in a vacuum. Negotiations involving other bargaining units in the same district or in adjacent and comparable districts play a major role. This forces school board negotiators to consider the terms of the district's other negotiated agreements as well as those in neighboring and comparable districts.

The origin of some union demands can be found in the contracts that other employees in the same district have negotiated. Support staff employees may push for many of the same terms and conditions that the professional employees have in their agreement. Binding arbitration, just cause, and past practice provisions are just a few examples of union demands that one bargaining unit might strongly desire because another district bargaining unit already has successfully negotiated them.

This internal comparability issue is always present when a district negotiates with more than one bargaining unit, and it may become even more important if the various groups of organized employees are affiliated with the same union, because that union will have a political need to seek comparable benefits for all the employees it represents.

External comparability is also a major factor in analyzing union demands. Teacher unions frequently use comparative data to develop their demands. A comprehensive dental program, unique in the county, can become the standard union demand in all other districts in the county.¹²

Union Politics

Virtually all local unions are affiliated with state and national organiza-

¹²All New Jersey chief school administrators and board secretaries receive complimentary copies of the *NJEA Research Bulletins*. The chief school administrator or board secretary may request complimentary copies for individual board members. In addition, the New Jersey School Boards Association publishes annually two research bulletins: *An Analysis of Teachers' Contracts in New Jersey* and *Collective Bargaining Data*.

tions that frequently offer bargaining advice and direction. The state affiliates will likely exert a stronger influence because they provide direct negotiations support to their locals.

In recent years, for example, the state association has advised its local affiliates to achieve certain bargaining goals. One goal is the agency shop arrangement, where non-union members are required to pay a representation fee in lieu of dues to the majority bargaining unit. The parties must agree to this provision before those deductions may be made.¹³ The state association obviously has a strong interest in seeing agency shop provisions in nearly all agreements. These provisions increase the size of the union's treasury, and thus strengthen the union's power on many levels, including the hiring of new staff, intensified lobbying activities, increased supportive services, data collection and analysis, etc.

Even where the state association does not directly gain from locally negotiated agreements, as is clearly the case with an agency shop provision, it still offers advice and direction. A few years ago when the annual inflation rate was exceeding ten percent, the state association was urging its local affiliates not to settle unless they received double digit increases. The urgings of the state association, obviously, are not binding on local affiliates, but they nevertheless set the tone and the character of negotiations statewide.

The state association further exerts influence in the local arena through its field service representatives or negotiations consultants. These individuals, who frequently serve as chief spokespersons, often carry the banner of the state association, and attempt to achieve these statewide goals in local bargaining. The extent to which this occurs depends upon the specific concerns of the local membership. But it is generally true, nonetheless, that the state association has objectives that local associations adopt, often with enthusiasm and commitment.

INTERNAL INTEREST GROUPS

As mentioned in Chapter 2, a major characteristic of collective bargaining is the internal bargaining among members of the same negotiating team. Every union has to deal with these internal bargaining matters. They are an inevitable part of the process, and the union must ultimately resolve them in some way before it settles with the board. These problems commonly arise among the various factions that the union represents.

The age and experience level of employees influences many major union priorities at the bargaining table. In the case of teachers, for example, salary guide construction assumes great importance. The more

¹³Chapter 477, Public Laws of 1979.

senior teachers, those approaching or at the maximum step of the salary guide, will generally prefer a different type of salary guide construction than their younger, less experienced counterparts. A straight, across-the-board percentage increase applied to each step of the guide has built-in advantages to the more senior employees, who will receive more dollars than an approach which would distribute equal dollar increases to all teachers regardless of where they fall on the guide. The latter approach is clearly more beneficial to the younger, less experienced teachers, who would receive a higher overall percentage increase than their older, more experienced counterparts.

Other issues also may create internal problems that the union must address. Older employees would see an advantage in longevity payments, additional sick days, improved health coverage, and payment for accumulated sick leave days upon retirement, while younger employees often see a greater benefit in a liberal tuition reimbursement plan or more personal days.

Differences in bargaining objectives among teachers exist on a variety of levels. They often emerge on the basis of the type of grade level structure that the district has. Elementary school teachers may have different concerns than their colleagues in the middle school or high school. The elementary school teachers may want more guaranteed duty-free lunch time and preparation time, a shorter workday, and less student contact time. Middle school teachers and high school teachers may also have their own set of priorities, such as a reduction in the number of teaching periods, and freedom from duty assignments, etc. Virtually no limit exists to the specific concerns that any of these special interest groups might have, and the union has to reconcile these internal disputes to arrive at a consensus concerning bargaining goals.

Support staff employees and professional staff members often negotiate together in the same bargaining unit. The union's job representing this type of combined unit is not an easy one, because differences existing between non-professional and professional employees are more dramatic and more difficult to accommodate.

These differences occur on a variety of levels. One difference concerns the relatively small amount of political power that support staff employees have in relation to that of the professional staff, that is the numbers of individuals who fall into each of these two groups. Without any special right of veto in the ratification process, support staff employees are clearly at a disadvantage in the ratification process because they are a minority segment of the bargaining unit. The professional employees will always be able to out vote them; thus, this power relationship has a tendency to dictate the union's bargaining priorities. Teacher goals invariably take precedence over those of other bargaining unit groups. Nothing emphasizes this point more than the way in which the parties agree to distribute the new monies on the salary guide. Although across-the-board

percentage increases would seemingly give all employees equal treatment, they do not! The dollars for each employee is a function of what that employee is currently receiving. Support staff employees, under these circumstances, are clearly disadvantaged. This may appear to be the union's problem, but it is management's problem as well, particularly where there are obvious salary inequities between highly-paid professionals and poorly-paid non-professionals. These inequities create morale as well as hiring problems. The latter results when the salary guides for support staff employees are not competitive enough to recruit new employees and retain current employees.

These are only a few possible internal union problems arising in bargaining. A school board must be aware of the existence of these problems, but, at the same time, must remain protective of its own bargaining interests as well. The board's interests will usually not parallel those of the union. Salary guide distribution is one of the thorniest problems and a prime example of those conflicting interests. In salary distribution matters, equity and fairness take on their own special meaning to whichever group they might apply.

Rank and File Goals

Many union demands are merely individual demands that the union bargaining team puts in its package to project the appearance that the union is sensitive to the needs of *all* employees. Many demands eventually fall off the table after the union negotiator makes some token expression on their behalf. The parties usually quickly dispose of absurd demands, such as daily free coffee and danish, free cars, and paid leave to attend a six month union negotiator's training program.

Many rank and file demands can be divided into several categories: salary, job security, guaranteed in-school free time, paid free time, and workload reductions. Each category has many aspects, but only a few will be mentioned. Salary and other economic benefits, like dental and prescription drug plans, commonly are top priorities. Job security concerns might be extremely important to some employees. Demands for guaranteed in-school free time that take the form of proposals for increases in guaranteed preparation and duty free lunch time are commonplace. Paid free time often translates into demands for additional sick and personal days, and more vacation time. Workload reductions characteristically include less teacher-student contact time or fewer classes taught.

Leadership Goals

In addition to the predictable assortment of rank and file demands, leadership goals become apparent. Union-oriented demands might concern guaranteed free time for the union president to allow him to conduct union business, the use of the intra-office mail, the right to use the

school bulletin board or to hold union meetings on the school premises.

The composition of the union's negotiating team may reveal, through the particular interests of each team member, the union's bargaining priorities. Those who are willing to spend many tiring and frustrating evenings on behalf of their members will normally not ignore their own special needs, or those of the groups they represent. A school board would be wise to notice who is on the union's negotiating team, in terms of individual needs and spheres of influence: high school teachers, guidance counselors, coaches, teachers at the top of the guide, etc. A role profile of union officers and negotiators identifying each individual's current salary, step on the guide, academic experience, position, length of service, building assignment and extracurricular assignments, if any, might reveal the union's priorities in negotiations.

A negotiating team comprised of more senior teachers will probably take a very strong position on the salary distribution method to ensure that more dollars are applied to the top of the guide. Their concerns may also center on longevity payments and payment for accumulated sick leave. This last benefit is particularly attractive to those teachers who are approaching retirement and who see this benefit as a form of severance allowance.

The negotiating team may be comprised of other categories of employees. There may be a coach or advisor who is advocating substantial increases in the stipends for individuals involved in extracurricular activities. There may be a teacher with substantial academic experience who believes that the salary differentials for advanced academic degrees are inadequate. There may be a custodian who strongly supports an increase in the stipend for custodians holding black seal licenses.

The needs of the negotiating team members should not be underestimated. They are different than those of the rest of the membership in one major respect: the team members must first agree among themselves that their needs have been largely met before they will return the contract to the entire membership for ratification. Obviously, the tentative agreement must meet the needs of a majority of those voting. But it is highly doubtful whether the membership would ever see the agreement, unless the negotiating team members believe that their general as well as specific interests have been satisfied.

PUTTING PIE-IN-THE SKY DEMANDS IN PERSPECTIVE

After initially reviewing the union's demands, many school board negotiators become upset and apprehensive. These feelings are understandable but largely unwarranted. Several reasons explain the excessive number and broad scope of these demands and how they may be put in perspective.

Ask For Everything

Unions will always ask for much more than they ever expect to obtain. But unless the union asks for everything possible, it might never know what it could have obtained. Simply stated, *nothing demanded, nothing received*.

Notion of Compromise

Excessive demands give the union bargaining leverage. The union can appear flexible and withdraw many demands or substantially modify others on which it never expected to obtain agreement in the first place. This process of "what can you do for us now that we have shown reason and demonstrated good faith?" is a ploy to extract more concessions from the board.

Special Interests

The union often raises the concerns of virtually all segments of the membership; therefore, the sheer number of demands is usually an indication that the union must appear to satisfy the many elements of its constituency. No realistic union will ever expect to get everything for everybody. But politically, the union believes it has no choice; it is unwilling to reject rank and file demands that it knows are unattainable. The union will eventually drop these demands, but will blame the "uncaring board," not the unrealistic employee.

Setting the Stage for Future Gains

A union that makes the same demands in each negotiations may believe that the more often the demand is made, the more likely it is that the board will accept it. This is a *long-term* strategy to make the demand appear more reasonable in the future. A proposal for four teaching periods for high school teachers may seem absurd today, but, after persistent reappearance at the bargaining table year after year, the demand may gain more credibility and perhaps acceptance.

EVALUATING UNION DEMANDS

Once the board determines the origin of union demands, and it puts the initial demands in their proper perspective, the process of evaluating them begins.

Costing Out

Should the cost of a demand be exorbitant, the union may not be very interested in it as proposed. Many union negotiators have little or no

knowledge of the cost of an accumulated sick leave payout or dental plan proposal. On the other hand, a union ready with information about a particular prescription drug plan probably wants that plan very much. Whatever the case, board negotiators should independently determine the cost of all initial and modified demands; otherwise, they risk buying something without ever looking at the price tag.

The Current Agreement

All demands should be seen as pieces of an unfinished puzzle. Do they neatly fit into the puzzle or do they add something more to it. Consider a demand for sabbatical leaves. Although it has an obvious cost factor, it may present additional complications. How would agreement on sabbatical leave fit into the rest of the agreement? Would an employee on sabbatical leave also receive tuition reimbursement, health benefits, additional sick days, and move to the next step on the guide upon returning to the district. Those are only a few important questions that board negotiators must answer, and they can answer them only by examining the demand in the context of the current agreement.

The Worst Possible Light Approach

No union demand should be accepted outright. Every demand must be scrutinized to uncover any negative element. A proposal for five days leave of absence for personal business without loss of pay may appear straight-forward until the board team determines that the proposal contains no provision for reasons being stated, no prior approval, and no limitations on when days can be taken. In addition, the board team must always consider the administrative impact of staff absenteeism, including the ability to find substitutes and the loss of instructional continuity.

Discovering Ambiguities

A number of school district officials, including the board attorney, should review union demands. Subtle differences in the meaning of these demands may emerge when people with different perspectives review them. These differences may not be as apparent if only the board team reviews these demands.

Determining the Extent of Support for Each Demand

Demands affecting a large segment of the employee population will probably be more important than those affecting a small segment of the bargaining unit. Salaries, fringe benefits, work hours, preparation time, and personal days are the types of major issues affecting all employees. The exception to this general rule occurs when union leaders have their own special interests which may take precedence over those of the general membership. But experience suggests that a demand affecting only three

or four employees in a bargaining unit of 300 or 400 would not ordinarily become a major issue that would hold up a settlement. Board negotiators should link each demand to its likely beneficiaries to determine the extent of the union's commitment to it.

SUMMARY

Analyzing union demands is a critical part of the preparation phase of bargaining and continues throughout the negotiations process until the parties sign their memorandum of understanding. It reduces the considerable uncertainty permeating the bargaining process and allows the board to identify more quickly the real issues and react accordingly. If the board knows what the union's priorities are, it can then carefully map out its strategy, and select the most appropriate tactics to achieve *its* bargaining objectives.

PROCEDURES FOR EFFECTIVE NEGOTIATIONS

7

INTRODUCTION

Effective negotiations procedures facilitate negotiations and speed up agreement.¹ Some procedures are merely administrative, and may appear obvious. Yet they are frequently overlooked, creating confusion, discomfort, short tempers, and wasted time. This makes reaching agreement more difficult and certainly less pleasant. Bargaining is a difficult process; the parties should try to make it as orderly and productive as possible.

PHYSICAL SETTING

Every set of negotiations demands a proper bargaining setting. The bargaining room should be large enough to comfortably hold both negotiating teams. It should be well ventilated to accommodate smokers without annoying non-smokers, and should be within easy access of a copy machine and important data. Blackboard and chalk should also be available in case the parties need to discuss cost figures, class scheduling, and other topics.

Adequate rooms for *caucusing* must also be available. Physical comfort is also a consideration here. Should identical facilities be unavailable, the parties must choose which side gets the more comfortable room. That should not be a difficult decision to make. However, forcing the union into cramped, uncomfortable quarters will not necessarily lead to faster concessions on their part. These conditions could reinforce the union's view that the employer is callous. This feeling grows as the discomfort of operating in cramped quarters during long negotiations sessions becomes more severe. Thus, comfortable caucus rooms are essential. In most negotiations, one side uses the caucus room, while the other team uses the negotiations room for its caucuses.

¹Some "procedural" matters discussed in this chapter are, in fact, *tactical considerations*. They will be described here, and again examined in Chapter 8, "Bargaining Tactics."

Coffee, cookies and soda should be available at a common location. These amenities may contribute to a better working relationship.

The physical setting and the amenities *are important*. From the board's point of view, the purpose of negotiations is to get the union to settle on terms acceptable to the board. A lack of animosity makes obtaining agreement easier. In contrast, the presence of animosity makes obtaining agreement harder.

Thus, when the board is considerate of the union team members, the union finds it harder to reject the board's reasonable efforts to compromise and settle on substantive issues. It also shows that the board intends to treat its adversaries with respect, courtesy and common decency.

SCHEDULING MEETINGS

School boards and teacher organizations generally have too many negotiations sessions. PERC's rules provide that school boards commence negotiations 120 days prior to the date that the public votes on the budget.² Because budget referenda currently occur on the first Tuesday in April, bargaining should technically not begin until the first week in December, *seven months before the contract expires*; however, the parties may initially agree to alter this date.

Beginning negotiations seven months before the contract expires may be unrealistic. PERC and the Legislature originally intended to have the parties conclude bargaining prior to final budget action by the public. The original scheme envisioned that the employer could include the new costs of the negotiated agreement in its final budget. This almost never happens, because the date of budget submission to the public is not a significant stimulus to serious bargaining. Instead, the end of the school year or the beginning of the new school year is the real stimulus for settlement in most school district negotiations. Nonetheless, many districts continue to meet according to PERC's commencement date despite evidence that this date is part of an artificial and unworkable time frame.

An early commencement date does not usually affect the date of settlement. The approaching end of the school year, the beginning of the new school year and the timing of settlements in neighboring districts more directly affect the date of settlement. Most districts wait for others to settle. An early start of bargaining does not mean negotiations will end any earlier than negotiations which started two months later.

Why do the parties then meet so early? One reason is that it is in the union's favor to do so. A board team that sits longer at the bargaining table will likely make more concessions. The team may become tired of hearing the same union arguments on the same issues. After having met

²N.J.A.C. 18:12-2.1.

eight times, with three months still left in the school year, the team may make concessions in the hope of spurring a settlement and of avoiding another eight meetings. The union may graciously accept the concessions, and then ask to schedule seven more meetings!

In general, the board is better off to delay the start of negotiations; however, many teacher contracts presently contain a clause referring to "Negotiations for a Successor Agreement," which mandates that the next negotiations resume on October 1 or October 15. This clause is a carry-over from the time when budget referenda were held in February. The contract binds the board to this date until the parties change it in negotiations. The simplest way is to delete the date and substitute the following language:

The parties agree to enter collective negotiations over a successor agreement according to the timetable established by the Public Employment Relations Commission.

In subsequent negotiations, the board might attempt to insert an even later starting date for bargaining, such as 120 days prior to contract expiration.

Regardless of the contract language, the board can always request a starting date later than that which is called for in the contract. A suggestion that bargaining should begin after the winter recess could free a district from an extra month of bargaining.

Delaying the commencement of negotiations will, at least, save some time and energy for the board representatives. It may even decrease the number of concessions they make to get a settlement.

Initial meetings should be short and infrequent, to allow the board to research and prepare. As bargaining moves closer to settlement, longer, perhaps more frequent meetings, may be needed. But reasonable time limits should always be adhered to. The parties should not usually meet past 11:00 p.m. in March unless they know that adjournment then will destroy chances for a settlement that night. On the other hand, the board should not become a slave to its own timelines: the board team should adjust these timelines if needed to attain its goals.

The value of time limits for each negotiations session is that they may push the parties toward closure on a certain issue. If the union knows that the session will end at 11:00 p.m., it may make the final compromise needed to wrap up the item the parties are discussing. A union that knows that the board team will stay indefinitely will feel no pressure to settle and will likely be intransigent, hoping that fatigue will force the board to capitulate.

Fatigue is a critical element in changing an opposing negotiator's perception of how important something is. Board negotiators should always use it to their advantage. If a 12 hour session will help to eliminate some stumbling blocks to a settlement on the board's terms, then both teams should stay until they reach agreement. On the other hand, should

the board team feel too tired to negotiate effectively, it should go home. This is the same advice that the National Education Association (NEA) offers to its teacher negotiators:

Use time as an ally. If your negotiating team can get to bargaining sessions well rested, whereas the board team is harried and fatigued, keep negotiations going until two or three o'clock in the morning. Wear down the board physically and psychologically. Ask them to clarify and explain their positions. Ask questions. Review the legal language of a proposal, and ask for the board's reaction. Make time work for you, not against you.³

Board negotiators should also realize that climactic, extended, marathon sessions are commonplace. If they expect a long session, board negotiators should eat lightly, rest and arrange for a day off the next day, if at all possible. Board negotiators who do not have to work the next day will be better able to concentrate clearly on the issues that they will be facing that evening.

INITIATION OF BARGAINING⁴

At the first bargaining session, the parties commonly discuss negotiations ground rules and union proposals.

Board and teacher bargaining teams used to spend weeks negotiating ground rules. This is uncommon now, because a consensus has developed on the importance of ground rules: they are important until one party finds them inconvenient. Ground rules are virtually impossible to enforce, except through willpower. Once one side has decided to discard them, the two parties' relations will have probably deteriorated to the point that appeals to past promises will be useless. Too many ground rules, therefore, are a waste of time.

A board should insist upon only three ground rules: raising new issues after bargaining begins, setting a beginning and ending time for bargaining sessions, and establishing procedures for handling discussions of proposals and counterproposals.

The first ground rule is that the parties will place no new items on the table after bargaining begins. This is the type of rule, as mentioned above, that one side can enforce only through sheer willpower. It is common for a union, particularly in mediation or in supermediation, to raise new issues as a "creative" approach to settle the dispute. These are usually

³National Education Association, *Verbal Skill in Negotiations* (Westwood, N.J.: R.C. Systems, Inc. 1972).

⁴ The remainder of this Chapter deals with the recommended structure of the first and second bargaining sessions and with subsequent sessions. Some school district negotiations begin with the simultaneous exchange of proposals. The particular structure of negotiations, of course, should be compatible with the school board's bargaining goals.

just new union demands, either to extract a concession (perhaps because the union negotiator knows the same mediator recently urged another board to make a similar concession), or to gain more leverage with the mediator by raising paper issues easily discarded "if the board shows similar movement." Although unions might try to raise additional issues after bargaining begins, boards rarely raise new issues after the start of bargaining. Therefore, a ground rule that no new issues be brought to the table is worthwhile demanding. It will help to keep the negotiations moving smoothly and avoid the sudden addition of new demands that one party "forgot" to include in its original package.

The second ground rule is that meetings begin and end at a set time. Some unions will balk at establishing such a cutoff time, but will usually agree if the board accepts the proviso: "unless the parties agree they are very near settlement on an issue and some additional time will be needed to settle the issue."

The third ground rule is actually a set of procedures for handling discussion of proposals and counterproposals. Only three basic things can happen to a proposal or counterproposal:

- ***There is an agreement to withdraw it.*** When this occurs, both spokespersons should each initial the item, along with the statement, "withdrawn," and date it. This avoids the possibility that this issue will reappear later in bargaining, to gain leverage with a mediator or to gain a board concession.
- ***There is an agreement to include it in the new contract.*** Should the parties agree to the proposal or counterproposal, both spokespersons should initial the item, mark it "tentatively agreed" or "TA'd," and date it.

The "tentativeness" of the agreement is more theoretical than actual and refers to the general principle that all areas of agreement are subject to agreement on the entire contract. In theory, either party could revoke a tentative agreement to limit personal leave days should both parties not agree on salaries. A negotiator who reneges on an earlier agreement, however, complicates negotiations, and risks alienating his counterpart. Should a novice union negotiator attempt to renege, the board negotiator should react strongly and vociferously, and insist that all issues previously "put to bed" stay there, and that future negotiations be limited only to the outstanding issues.

This ground rule, like the others, can be enforced only by willpower. But this is one area where the union will almost always back down if the board challenges it.

- ***There is no immediate agreement.*** If parties cannot agree after a reasonable period of discussion, they should put the matter aside and go on to something else. *Initial disagreement should not obstruct negotiations.*

A demand that the parties have set aside will either be

brought back to the table later, after the parties have settled easier issues, established a more constructive atmosphere, and have more information to handle this troublesome item, or it may never surface again. Board negotiators *should not* remind the union that it has forgotten recently to discuss this demand.

The union that does not raise a demand again may be dropping it gracefully without openly conceding. The board negotiator who reminds the union of this "lost demand" may force the union to renew its insistence upon it. A union that raises an old demand on its own, once the new agreement is nearly in place, is probably attempting to squeeze another concession from the board. If the matter has been dormant for so long, it cannot be that important to the union. The union will eventually drop the demand if the board firmly states that it will not concede to it.

Agreement on these ground rules should be enough to keep negotiations running smoothly. One common ground rule *not* recommended is that the parties give only *joint* press releases to the media. The unions have termed this ground rule beneficial because it steers the parties away from "negotiating in the press," a process that admittedly rarely works to either side's benefit.

The problems with a blackout on unilateral press releases have become evident in recent years, and compel the conclusion that a ground rule limiting the parties to joint press releases has little benefit to the board, and potentially major benefit to the union.

Two major problems exist. First, a press blackout cuts off the board from its constituency (the public), but does not cut off the union from its constituency (the union membership). It basically dictates that the board cannot talk to its constituency, but the union can talk to its members. Second, the press blackout is the kind of ground rule which lasts only for as long as it is convenient for both sides. And typically, it becomes inconvenient for the union first. The union may break the silence and issue a press statement accusing the board of stalling, bad faith bargaining, and a lack of interest in the welfare of the employees and the students. That initial press statement will characterize the union's demands as being either "for the good of the children" or "moderate compensation increases to help keep pace with the economy." It puts the board on the defensive, but, because it is the first shot in the propaganda war, it somehow rings true to the public. The statement tends to linger in the public's mind, defining the background for all future public discussion of the negotiations. Consequently, a joint blackout is *not* to the board's benefit, and the board should not agree to this ground rule.⁵

⁵For a detailed communications plan regarding negotiations, see Garry M. Whalen *et al.*, "Communicating with the Public During Negotiations," *Negotiations 1982*, (Trenton, N.J.: New Jersey School Boards Association, 1981), pp. 13-16.

During the initial meeting, the board usually receives the union's proposals. Board negotiators should try to get a copy of the union's proposals in advance of the first meeting. They can then react to them at the initial meeting. The reaction should be limited to clarifications. Board negotiators should not reveal whether they will agree, agree with modifications, or disagree to these proposals. They should merely ask the union to justify its demands, so the board can assess their relative importance.

Before the board first reacts to the union's proposals the board negotiator should make an opening statement expressing optimism for a reasonable and mutually satisfactory settlement. This statement is part of a strategy to establish a cooperative and constructive atmosphere. It is not a deception, but a recognition that cordiality and positive thinking are important ingredients of a satisfactory settlement.

THE SECOND SESSION

At the second bargaining session, the parties usually discuss management's proposals, and attempt to agree upon an agenda for subsequent meetings. The school board's proposals represent the district's goals in negotiations. They are not counterproposals to the union demands; the board will submit those at a later date.

The chief spokesperson should summarize each proposal to clarify its intent. His attitude toward the board's proposals at this time is crucial. Although Chapter 8 will examine verbal tactics in depth, one should be highlighted now. Should the board negotiator submit a proposal in an uneasy manner and tone, the union will immediately realize that the proposal is a throwaway. The negotiator is indicating that he expects the union to reject this proposal, and the union almost certainly will. However, if the negotiator knowledgeably and enthusiastically presents a board's proposal, the union will have to seriously consider it. The union will believe that the board is committed to that proposal. That belief is essential to the board's attaining its goals, and achieving the maximum bargaining leverage possible from each proposal it submits.

At the second session, the parties may set the agenda for subsequent meetings and usually agree to discuss noneconomic and less important items first and leave the wage and economic benefit items for last. This is the more desirable approach for a few reasons:

- Money, after all, is the union's major item. A board that holds back money offers will spur the union to drop certain proposals or compromise on others so the parties can then move on to the money items. If the board tells the union that the longer it discusses a language change item, the longer it will have to wait for a management money offer, the parties will spend less time on language discussions.

- The parties can usually easily agree to the less important language items. This helps create a cooperative, constructive atmosphere, which will help when both sides tackle the tougher economic and/or management rights proposals.
- The parties should be dealing in dollars and cents, instead of complicated qualifications and exclusions of a child-care leave clause, when they are completing bargaining at 5:00 a.m. in June or September.
- The parties should keep economic items together because they will understand the trade-offs involved. Chapter 8 discusses packaging as a tactic, but the most important application of packaging occurs on economic items. A board that holds off on discussing all economic items ensures its ability to package them into a total compensation offer. A board that discusses and agrees to isolated union economic demands early in negotiations will end up spending more money to get a settlement than had it held off all money discussions until the end of bargaining.

Some negotiators believe that the order in which the parties discuss demands is critical to their position. They believe that they have a better chance of obtaining their objectives if their proposals are discussed first. Today, the emphasis is on packaging and trade-offs as bargaining tactics; therefore, a rigid order of discussion is somewhat impractical. Should the board response to a union demand be a "yes," subject to the union withdrawing two demands and/or conceding on one of the board's proposals, a numbered agenda might prove obstructive to attaining the board's goals.

The board should insist that management proposals not be separated from union demands, and relegated to discussion at some later date. Beyond that, a general agreement to divide noneconomic and economic demands, and to table issues on which no agreement is immediate (perhaps because management wishes to link them to a concession on money), is usually good enough to provide order to the proceedings. Thereafter, the parties can agree to deal with one proposal from each side per meeting, or to group like items together.

SUBSEQUENT MEETINGS

During subsequent meetings, the parties will discuss various proposals, separately or in tandem. Should the topic for discussion be a union proposal, the board negotiator should, whenever possible, shift the discussion to a management counterproposal. *Never work off the union's proposals, for several reasons:*

- The board's counterproposal may address the core of the problem, and may be quite satisfactory to the union and to the particular employees affected; however, the counterproposal will

not have the excess language or unneeded costs of the union's original demand.

- The board's counterproposal may link the union demand to certain qualifications that the board sets. The union may then lose interest in the whole issue. The union, for example, may demand an increase in the number of sabbaticals available each year. The board might rewrite the demand to allow for an increased number, but the counterproposal would also contain restrictions on the eligible activities and tighten up the reporting requirements of those on sabbatical. In that context, the union may begin to view the *status quo* as more attractive, and the entire matter may fall off the table.
- Rewriting the union's proposal and calling it the board's counterproposal, even if the substantive changes are minor, are important because this creates the appearance and therefore, to some extent, the reality that the board controls the meeting.

Conversely, if the parties are discussing a board proposal, the board should try to keep discussion focused on its documents. The board negotiator may be quite willing to accept the union's amendments to the board's proposal, but he should not allow the union's counterproposal to overshadow the board's proposal. The exception, of course, is where the board carefully determines that the union counterproposal gives it as much or more than its original proposal. There is no harm done, and some goodwill can be earned, if the board negotiator satisfies his opponent's ego and accepts his counterproposal. Again, this acceptance occurs only if the counterproposal meets the board's needs.

Board negotiators should specify the areas of agreement when they discuss a proposal or counterproposal. There may not be any. But agreeing that a problem exists, and empathizing with the teachers' situation, *does not* mean that the board will make any sort of concession. It should mean only that the board is open-minded and sincerely interested in the teachers' real problems.

Board negotiators should also specify the areas of disagreement, and, if appropriate, the costs involved. Board negotiators must ask for the union's estimate of costs for every demand, and then they must do their own analysis to verify the union's figures.

The parties will continue to negotiate in accordance with the procedures established in the ground rules: to agreement; to agreement, with modifications; to disagreement and withdrawal; to disagreement, and temporarily setting aside for discussion or possible withdrawal at a later date.

SUMMARY

Effective negotiations procedures enable the parties to keep bargaining on track. A comfortable and pleasant physical setting may create the

right environment to enable the parties to reach a satisfactory, mutual settlement, devoid of unneeded animosities. The board should schedule meetings that are not too early, too frequent, or too long during the initial stages of bargaining. The parties should also limit the number of bargaining ground rules.

The board team should carefully examine all union proposals, and develop its own proposals and counterproposals. The team should further insist that the parties negotiate noneconomic issues first. After the parties dispose of these issues, they should treat the economic issues as a total compensation package. Bargaining procedures do not entail mere administrative details; they can create a positive mood, and add structure to an otherwise difficult process.

INTRODUCTION

Bargaining tactics help the negotiator to settle differences on terms acceptable to him. As the negotiator strives to achieve some or all of his side's objectives, he must also satisfy some of the other side's needs, to gain an agreement. Some management negotiators argue that their goal should always be to settle on a wage and benefit package that is similar, if not identical, to the terms and conditions of employment that the employer would unilaterally establish were no union present. The package would be generous enough to attract and retain employees, and keep their morale high, but would avoid regulations and procedures that impede managerial efficiency.

Bargaining tactics underscore bargaining as a dynamic process. They spur the *movement* of two adversaries, from their starting positions, which are each unacceptable to the other, to some point of settlement, when each side embraces the same position on each issue.

PERCEPTIONS AND REALITY

Bargaining is dynamic because it deals with *perceptions*. No hard *reality*, nor absolute or scientific truth, exists at the bargaining table. What the negotiators *believe* to be true, or what they *perceive* to be the case, becomes critical. And their *perceptions change constantly* due to changing circumstances.

Bargaining begins with two sets of perceptions—the board's and the union's. The board has certain perceptions about what it needs, and about what the union needs; likewise, the union has a view of what it needs, and of what the board needs. These perceived needs have two elements: *issues* and *personalities*.

Issues translate into proposals and counterproposals. Some issues deal with organizational needs, and some union issues, especially, relate to personal needs. For example, a board proposal to restrict personal leave use is an *organizational* issue; the board believes a restriction would increase the district's efficiency. A union demand for a salary increase is an

organizational issue; the union believes that every bargaining unit member will benefit to some degree. But a union demand to increase the sabbatical leave allowance, when all four teachers on the union's negotiating team are eligible for sabbaticals next year, is actually a *personal* issue.

Perceptions about *personalities* do not concern negotiable issues; however, they still are very important in the bargaining process. Personalities emerge on two levels: the *ego* level and the *political* level. On the ego level, the negotiator wants to complete bargaining with a *feeling of pride and accomplishment*. He does not want to feel as though someone has made a fool out of him. On the political level, the negotiator wants his *constituents* to believe that he has done a good job. The union negotiator wants the membership to appreciate his achievements. The board negotiator wants the full board to support his recommendations for settlement.

Individuals who use bargaining tactics have to recognize that issues and personalities are intimately involved in negotiations. A negotiator cannot be completely successful if he addresses one but not the other. For instance, the board might offer an initial benefit package that both sides believe is fair; still, the union negotiator will reject it if he believes that the membership will perceive acceptance of this package as union capitulation. Tactics, therefore, must balance the importance of the issues with the needs of the various personalities at the table.

ROLE REVERSAL

The board negotiator must know what the other side wants. He should put himself in the union negotiator's place, think about his counterpart's perspective on the issue, and use the district's supervisors and administrators to evaluate the present contract and the union's proposals.¹ All these steps help the board negotiator to understand many of the union's priorities.

The negotiator should also employ role reversal regarding the personalities on the union's team. Will certain statements or tactics tend to antagonize certain members? If the board negotiator attacks the logic of the union representative, will the union team view this as an attack on its intelligence? The negotiator should be careful to only address *issues* and *problems*; he should avoid even implicitly attacking personalities. The board negotiator who knows the *issues*, knows the union's *goals*, and knows the *personalities*, can then employ role reversal before proceeding with a certain tactic.

¹See Chapter 5 "Analyzing The Current Agreement."

LISTENING

Some people complain that conversation is a dying art in this country. People often fail to listen to what the other person is saying, because they are so eager to say something themselves. Although this may be a sad development in our culture, *it can be a fatal error in bargaining*. The board negotiator should listen to what his counterpart is saying, and to the way he is saying it. This is an essential skill in negotiations.

Management is generally better off *listening than talking* during negotiations.

- Attentive listening indicates *empathy*. It is a "no cost" way by which the board can show the union that it is sincerely interested in the welfare of teachers. Listening also shows that the board recognizes the union negotiators as the legitimate representatives of the staff. On some issues, the board only has to display a respectful attitude as the union describes a concern, to satisfy the union's need on that issue.
- Listening permits the board negotiator to increase his *knowledge* about the union's goals and priorities. He *learns* nothing by talking. But listening enables him to evaluate *the tone of the union's remarks* and the *quality of the explanation*. He can then gauge the priority that the union is attaching to its demand.
- Listening permits the board negotiator to uncover the *real problem*. Union demands frequently go well beyond the true problem they seek to address.

The only requirement of a good listener is *patience*. It is an important trait of the successful negotiator. A board member or administrator who is short of patience should evaluate whether bargaining is the right activity for him.

A good test of one's listening ability involves repeating what has just been said. After the union negotiator says something, the board negotiator should respond, "You're saying to me...", repeating the union negotiator's previous statement as well as he can. The board negotiator may well forget part of that statement, proving that he had not listened as well as he should have. If the union negotiator then repeats the statement but also forgets a part of it, he may be revealing much about his commitment to that issue.

SEEKING AREAS OF COMMONALITY

The board representative should note first any areas of agreement concerning a union demand. Many union demands contain at least some element that the board can agree to, even though it may be unrelated to the union's primary goal. But the board negotiator who emphasizes what

the board can agree to reinforces the desired image that the school board team is open-minded and sincerely interested in its employees.

Likewise, when the board negotiator discusses the board's proposals or counterproposals, he should emphasize the common aspects that both sides can agree upon. The negotiator should stress the mutual benefits of his proposal to make it more acceptable to the union or to make the union's proposal less important to the union.

Suppose the board wants teachers to forego their preparation time when substitutes are unavailable. The board negotiator should *not* insist that teachers do not need preparation time, or that an adequate number of substitutes is too expensive. He should highlight the danger to students who remain in classrooms without adequate supervision, and point out that the disruption of one class because of inadequate supervision also affects other classes.

Suppose the union wants unlimited tuition reimbursement, to "encourage teachers to upgrade their subject knowledge and teaching skills for the good of the district." The board negotiator could recognize the need to upgrade teacher knowledge and skills, but he also should note that many colleges offer courses that are weak substantively, or that are completely unrelated to the knowledge and skills needed "for the good of the district." Therefore, the board's counterproposal might be that the superintendent must approve all courses prior to teachers registering for them, and that teachers must complete all courses with a grade of *B* or better before the district reimburses them.

The board negotiator who emphasizes common goals will assist his side in reaching agreement on terms that it finds acceptable. This tactic also gives the union team a rationale to use, if necessary, when it returns to its membership for ratification of the tentative agreement.

PUTTING THE BURDEN ON THE OTHER SIDE

The union is the principal moving party in negotiations. Inasmuch as the union is generally trying to change the *status quo*, it should bear the burden of proof. But the union frequently tries to put the board on the defensive and insists that the board explain to the union its satisfaction its refusal to concede to the union demand. Remember that school boards have a tremendous advantage. They have the authority to give something away; the union does not. Therefore, school board negotiators must constantly ask the union to justify its demands. They should insist that the union prove the need for the change, and prove that the demand satisfies that need, and satisfies the interests of the board and school administration.

The board negotiator who disagrees with the union's rationale should tell the union negotiator that his demand does not deal with the real problem or that it may be too costly in terms of time or efficiency. The board

negotiator could state his disagreement in various ways:

- "I'm not convinced that is a real problem...";
- "I don't see how this helps the district...";
- "Explain it to me again..."; and,
- "This is not a persuasive case..."

By stating his disagreement this way, the board negotiator keeps the burden on the union and minimizes the chance that the board will make an unnecessary concession.

The board negotiator can use other techniques to keep the burden of proof on the union. He should ask the union negotiator probing questions to uncover what the real problem, if any, is. It may be much smaller than the union's claim or perception, and can be handled outside the collective bargaining agreement at no or little cost. Constant questioning also may convince the union negotiator to drop the demand altogether. This technique also conveys that the board firmly opposes the demand, implying that the board would only concede in exchange for a serious concession by the union on another matter.

WORKING OFF YOUR OWN LANGUAGE

This tactic affects both board proposals and counterproposals. The rule is: always avoid working off the union's proposals. It is clearly a matter of willpower. The board negotiator should rewrite the union proposal to make it acceptable to his side, as was shown in the earlier tuition reimbursement example, or rewrite it with changes that will make the *status quo* look more acceptable. The board negotiator should then *insist* that his counterproposal be the topic of negotiations. Several reasons highlight the importance of the counterproposal:

- the board's counterproposal may satisfy the union's *real problem* without the unneeded costs of the union's extra language;
- the board's counterproposal may show the union the dangers it is taking in upsetting the *status quo*; the counterproposal may consider some concerns, but it also threatens present advantages or attaches unacceptable qualifications; and,
- a board team that insists on the use of its counterproposal, despite only minor substantive changes in the union's proposal, creates the appearance, and, therefore, the reality, that it is controlling the meeting.

It is an onerous process to rewrite the union's proposals. But it is a proven technique, which makes the board appear conciliatory but which also protects the board's bargaining interests.

If the union proposal seeks to change the *present* contract language,

the board should initially rest on the present language, and insist that the union prove that there is a serious need for a change, and that its demand successfully addresses that need. If the union offers adequate proof, then the board should switch the discussion to its counterproposal.

KEEPING ECONOMIC ITEMS TOGETHER

The union would prefer to address economic items one at a time, without reference to any other economic items. This tactic increases the chance that the board will not link the cost of one economic item to another, nor compare the total cost to the new monies available for the new contract year.

It can be very costly if the board fails to link the cost of all economic items. The board negotiator must insist that the parties treat all economic items as a group, to emphasize their relationship to the cost of the full settlement. The board must consider all economic items in terms of *total compensation* and *total cost to the board*.

The board team must cost out all proposals and counterproposals before it agrees to anything, and compare them to the amount of money available in the budget.² A team that fails to accurately cost out union and board proposals may find itself in a terrible tactical position at the bargaining table, and in an even worse position when the agreement goes to the full board for ratification. Furthermore, the entire board may find itself in a potentially disastrous situation when it implements the agreement in September.

Board negotiators must demand the *union's cost estimates*. If the union's estimates are poorly prepared and inaccurate, the union may be giving little priority to that proposal.

Finally, the board negotiator should demand spending limitations (caps) on the maximum expenditure for each benefit per contract year. It is relatively easy to obtain a cap on a new benefit, because the union and its members will perceive any concession as a victory. It is much more difficult to cap existing benefits; however, the board could obtain a cap on such benefits, as long as the cap is set high enough so that the board's actual costs will not exceed the cap in the first or second year of the contract. Caps make budgeting more precise, give the board more leverage in future negotiations, and remind employees that "fringe" benefits cost real dollars.

TRADE-OFFS

A basic, but often under-utilized bargaining tactic, is the simple trade.

²See Curt Wary, *Costing Out the Labor Agreement* (Trenton, N.J.: New Jersey School Boards Association, 1982).

Trade-offs involve concessions that one side makes, in return for which it demands the other side's agreement to accept or eliminate a proposal.

Trade-offs can take four forms:

- the board agrees to a union demand if the union agrees to a board demand;
- the board withdraws a demand if the union withdraws a demand;
- the union agrees to a board demand if the board withdraws one of its other demands;
- the board agrees to a union demand if the union withdraws one of its demands.³

The following scenario might occur if a board fails to trade-off. The union demands sabbatical leaves at half pay, and the board demands restrictions on personal leave usage; the board agrees to accept the union's sabbatical leave clause, with minor changes, and the parties sign off on that matter; the board then asks the union to consider its personal leave proposal, and the union flatly rejects the demand! The board has gained nothing because it failed to insist on a *trade* when it agreed to the union's sabbatical leave demand.

Two rules emerge:

- *always get something for a concession*
- *never move twice in a row.*

The earlier discussion underscores the first rule. The board should always get something when it gives something.

The second rule is equally important. Suppose the board offers a three percent raise, and the union demands fifteen percent. The board increases its offer to four percent, but the union flatly refuses it. The board then offers a five percent raise. The union representative responds, "Let's be reasonable about this. We'll split the difference!" By moving twice in a row, the board has rewarded the union's intransigence, and has left itself in a more difficult position regarding future compromises. This occurs too frequently in real bargaining, and is also common in mediation. The mediator often asks the board for "just a little more" two or three times in a row, then he finally proposes that the parties "split the difference."

PACKAGING

A more complex form of trading is packaging. A package is a multi-

³The board negotiator should not grant unnecessary concessions to get the union to withdraw its frivolous proposals. He should always link his concessions to the withdrawal of *important* union demands. A board negotiator who would never have conceded to a certain demand should not agree to a trade-off to get the union to drop the demand.

issue proposal, made by either side, containing some concessions to the union, some to the board, and, usually, the withdrawal of certain demands by one or both parties.

The board negotiator offering a package must clearly state that the union may accept or reject the package as a whole. If the union rejects the package, the board team will consider a comprehensive union counterproposal. *But the union cannot accept one part of the board's package without accepting the total package.*

Any useful package offer must contain some board concessions; otherwise, the union has no incentive to agree to it, nor even seriously consider it. The package should not contain the board's final position on all the issues, but it should be attractive enough so that the parties now focus only on the package in the future. The union may not accept the board's package, but the union's response to it will tell the board much about the union's priorities.

Consequently, a board that offers a package proposal should also insist that the union respond with a *package counterproposal*. The board should not let the union pull out one element of the package, negotiate to improve it, then pull out another part, seek to improve that part, etc. The board needs a comprehensive union counterproposal to identify all areas of continued agreement and disagreement.

Packaging is most frequently used to complete negotiations, but it can be useful throughout bargaining. For example, the union could concede on two minor issues, and withdraw two other demands, if the board concedes on two union issues.

Packaging, however, has a danger. Once the board moves on a certain item that is part of a package, the board can no longer claim that it will not concede on that item as a matter of principle.

The negotiator who wishes to back off convincingly after including an item contained in a package must show that the item was directly connected to union movement on a board proposal, or to union withdrawal of one of its proposals. Suppose a board package contains an increase in tuition reimbursement *and* the elimination of the BA + 15 and MA + 15 salary guide columns. Should the union negotiator reject the elimination of the two salary columns, the board negotiator can convincingly withdraw its offer of increased reimbursement. Should the board package also grant binding arbitration but reject the union demand for dental insurance, the board negotiator will have difficulty saying that binding arbitration is the *quid pro quo* for dropping dental insurance. The two items have little to do with each other. The union negotiator will assume he can eventually obtain both items, and will structure his counterproposals accordingly.

Packages containing economic and noneconomic items are particularly dangerous. Some connection should exist between the components of the package, so that the board negotiator can argue persuasively that he will not accept one component alone. For that reason, the board negotiator should package economic and non-economic items separately.

RECORDKEEPING

It is essential that accurate records be kept of:

- who said what and when;
- who made the last move on an item;
- when was a certain demand withdrawn; and,
- which items were linked to a trade-off or a package.

Records also should show when the union's arguments for certain demands weakened, or when the union began to focus on more narrow issues which the parties can more easily and inexpensively resolve.

Good recordkeeping also prevents the union from reviving dead issues, and also helps during the period of contract administration.⁴ One team member should have specific note-taking responsibilities.

MOVING SLOWLY AND INCREMENTALLY

This tactic is based upon the principle, "In negotiations, it is less important how much one moves as how often one moves." One-half percent increases given 12 times get more trade-offs and provides more personal satisfaction to the union negotiator than one percent increases occurring only six times.

Slow incremental movement applies not only to salary but also to nearly all other union demands. If the union demands unlimited tuition reimbursement, various board counterproposals may include, but are not limited to:

- complete rejection as unwarranted;
- six graduate credits, with a \$200 per person maximum per annum;
- nine graduate credits, reimbursed at a rate of twenty-five dollars per credit;
- nine graduate credits, intimately and directly related to the teacher's current area of professional responsibilities, with a maximum allowable reimbursement per teacher of \$600 per annum;
- six graduate credits, intimately and directly related to the teacher's current area of professional responsibility, at the state college rate per credit;
- a maximum board contribution of \$5,000 per year for the entire bargaining unit;
- three graduate credits at the state college rate per credit for

⁴See Chapter 13, "Contract Administration."

non-tenured teachers, and six graduate credits at the state college rate per credit for tenured teachers.

• etc.

There are three reasons why the board should proceed slowly before it makes its best offer on a particular issue. First, it gains more trade-offs along the way. Second, it gives the union negotiator more satisfaction. Finally, slow incremental movement increases the board's chances to settle at a minimum cost, because it gives the union an opportunity to accept an offer at less than the board's "final" position.

The concept of slow and incremental movement also anticipates future negotiations. A board should concede in each negotiation only to what is necessary to attain a settlement. The board will then have room to move more during the next round of negotiations. A union seeking dental insurance for the first time will probably agree to virtually any form of dental insurance, because any board concession represents a union victory. The first contract might provide for employee only coverage, with a \$100 cap per employee. The second contract might raise the cap, and let the employees opt, at their own expense, for family coverage. The third contract might finally provide some board payment toward family coverage, but again with a cap. In each negotiations, the union has improved the benefit, but the board has retained room to move in future bargaining. And, each time the board moves, the board demands a union concession as a *quid pro quo*.

TIMING

Timing is a key element in negotiations. It concerns *when* an initial offer is made, *when* it is improved, *how much* and *how quickly* it is improved, *when* a *final* offer is made, and *when* and *how* a union proposal is *accepted*.

It matters less *what* one says than *how* and *when* one says it. Generally speaking, "the later the offer, the slower the movement, and the smaller the concession, the better management's position is in negotiations."

The union is usually at the table to get more than merely the best agreement possible. (If that were true, negotiations would be "short and sweet" in 90 percent of the cases.) The union also has other interests.

One is the *personal pleasure* and ego satisfaction that the union gets in "facing down" the employer across the table. Thus, a board offer that is "fair and final" but offered too early in negotiations is an *insult* to the union negotiator who comes to the table because he *loves to negotiate*.

A second is the union's *political need* to prove to the members that the union is doing a terrific job of representing their interests. In many districts, the union members would not ratify a tentative agreement concluded in February, some five months before the new contract takes ef-

fect. They believe that "if the board offers this package in *February*, it will offer *more in June*." Had the board held back that February offer and made that same offer in June, the members would have easily accepted it. Their reaction is reasonable; after all, the board's offer can only get better. *Timing*, therefore, involves a keen sense of when to make an offer to *maximize that offer's acceptability to the other side*.

Some union negotiators argue that, because management is reluctant to make its "best" offer early in negotiations, the union is forced to constantly batter management for a better offer. But these are the same union negotiators who always ask for 20 percent or more in salary increases in the first year of the contract! The union is the party seeking changes in the *status quo*; were it sincerely interested in a swift end to bargaining, it would begin negotiations with a moderate first offer.

Timing also involves an appreciation of when to *accept* a proposal. The experienced negotiator knows how to combine the right amount of hesitance with the knowledge that a good offer may mysteriously "disappear" if it is not accepted before the negotiations session ends. The negotiator who too quickly accepts an offer prompts the other side to think that it has been had. On the other hand, one side's *unwillingness* to accept a good offer may give the other side an opportunity to reexamine its position. The other side may change its position at the next negotiations session, or attach clearly unacceptable "conditions" to its prior offer.

GETTING THE UNION TO OFFER AN ACCEPTABLE PACKAGE

The board negotiator *should not* make his best offer in the hope that the union will blindly accept it. This is true in mediation, as well as in any direct bargaining. The board negotiator who privately talks with his union counterpart must try to get the union representative to come back with an acceptable demand. The board negotiator might say; "The most I can offer is 6 percent. But if you can get me 6.5 percent I think I can sell it." Should the union negotiator be unable to produce the 6.5 percent demand, the board negotiator at least knows that had he made the offer, the union negotiator would have rejected it. But the board negotiator has not officially made the offer, and thus he retains some flexibility for future negotiations. This tactic also gives the union the satisfaction of gaining the last concession, when it demands an increase that the board is willing to accept.

MAKING YOUR FINAL OFFER

When should the board make its final offer? It obviously should not be made too early in bargaining, because the union will not believe that

it is truly "final."

The controversy is whether the board should ever make its best offer. Some negotiators believe that a board should make its best offer prior to a strike, to know that it has taken every possible step to avert a work stoppage. Others argue that many strikes are inevitable and a best offer prior to the strike will merely force the board to eventually increase its offer to end the strike, or force a longer strike as the union waits for an improved offer that the board will never make.

Without a realistic strike threat, however, a board should not make its final offer unless it is certain that the union will accept it. This is admittedly difficult to do when the negotiations have taken eight months, when the end of the school year is imminent, and when the board team is just plain frustrated and tired. Still, a board that makes its best offer without knowing whether the union will accept it is taking serious risks. Should the union reject the board's best offer, the board must endure more long and frustrating bargaining sessions, and must struggle to convince the union that "final" means "final." The other choice is for the board to improve its "final offer" in order to reach a settlement.

Time is on the board's side in negotiations. But board negotiators must have the patience to use it. They should hold back something until they are sure that a settlement is at hand.

SUMMARY

Many tactics discussed in this chapter are interrelated. Keeping economic items together is a special form of packaging. Patience and listening are linked to slow, incremental movement. Working off the board's proposals keeps the burden of proof on the union.

Tactics will tend to increase the acceptability of the board's position on an issue, and weaken or redirect the union's commitment to its original demands; however, tactics are only special techniques for use in the adversary process of negotiations. Should a fast-talking, loud, and aggressive union negotiator overpower the board negotiator, tactics are useless. The most important qualities of a school district negotiator are resolve and fortitude. A board negotiator who has those qualities and who applies the skills discussed in this book can successfully protect the district's interests in negotiations.

COMMUNICATIONS AT THE TABLE

9

INTRODUCTION

Bargaining power is the ability that one party has to make the other party settle on its terms. Various factors contribute to a party's bargaining power, including team unity, financial resources, and public support. But collective negotiations also involves the art of persuasion. This part of collective negotiations is most similar to other kinds of negotiations. Salespersons say that they "negotiate" the sale of furniture or the sale of automobiles. Attorneys describe commercial or real estate transactions as "negotiated agreements." Normally these negotiations have very little to do with labor negotiations; however, they are similar because they all involve a high degree of persuasion.

The goal of oral communications is the same as the general goal of bargaining—to get one party to settle on the other party's terms. *Thus, effective oral communications in school district negotiations will increase the acceptability of the board's position to the union and decrease the union's commitment to its original position.* This chapter examines how oral communications can help the board achieve its bargaining goals.

PRESENTING YOUR PROPOSALS AND COUNTERPROPOSALS

When presenting any proposal, the board negotiator should emphasize its positive aspects. When the board proposes a cap on tuition reimbursement, the board negotiator should highlight the value of the cap to the entire bargaining unit.

By capping tuition reimbursement per employee, the board will have more money available for the rest of the unit. If we retain the present no limit on the annual reimbursement per employee, some people will have to get lower salary increases because somebody else will be getting \$3,000 a year in tuition reimbursement.

The emphasis should be on the positive aspect of the board's proposal; de-emphasize that the proposal takes away part of a benefit.

Always present a proposal in a way that assumes that the union will accept it. This is especially important when the proposal involves a restriction on a current benefit or an expansion of a management right. The negotiator's tone and manner should imply that he expects the other party to think his proposal is a great idea. Should he imply that he expects the union negotiator to reject his proposal, the union negotiator probably will. Should he present his proposal expecting the union spokesperson to laugh at it, that spokesperson probably will. On the other hand, if he raises that same issue enthusiastically and with commitment, the union negotiator might still not accept it. But at least the union negotiator knows that he may have to trade-off something to get the board negotiator to withdraw his proposal.

The following dialogue underscores these two points: *emphasize the positive aspect of the board's proposals, and present them in a way that assumes their acceptability.*

The Right Way

Board Negotiator: The Board's incentive pay proposal is designed to acknowledge the services of many of our fine teachers who are doing an excellent job for the system. We want to recognize excellence in a way that will encourage other teachers to perform to their highest potential. This proposal, if adopted, will bring out the best in our teaching staff.

The Wrong Way

Board Negotiator: The Board's incentive plan is designed to separate the good from the bad teachers, the competent from the incompetent, and the inspired from the uninspired. A financial reward system will force those unproductive teachers to shape up.

The Right Way

Board Negotiator: I know the teaching staff aspires to professional excellence, and that we can work together to attain that goal, which is in the interests of all concerned: students, parents, teachers, school administrators, and school board members. Our goal is the same as yours—to provide the best possible education for our youngsters by attracting and retaining the best teachers for our district. Our proposal, to place new teachers at any point on the salary guide and to push outstanding teachers up one step higher on the guide than they would normally fall, will achieve these goals. It's good for the teaching staff and it's good for the district.

The Wrong Way

Board Negotiator: I know you're not going to like this idea, but let me throw it out anyway. We want complete freedom to hire a teacher at any step on the guide and to give a teacher two increments in one year, instead of just moving him or her up one step as we do for everyone else. There probably will be more problems, but trust us on this one.

The first statement emphasizes the positive aspect of the board's proposal, whereas the second does just the opposite—it emphasizes the negative aspect of the proposal. The third statement stresses the acceptability of the board's proposal whereas, the fourth statement is begging the union to reject the proposal.

When the board negotiator presents his proposals, he should not misrepresent the facts. He may make some short-run gains if he misrepresents the facts in negotiations. But, in the long run, the union representative and members will figure out that they were tricked, and will no longer trust those who mislead or deceived them.

Good faith bargaining implies a fair amount of honesty. The board negotiator should not necessarily tell the union team everything, but it is something else again for him to actually lie. Lying is an expensive way to make a foolish, short-run gain. Negotiators have enough problems when someone makes a good faith error regarding the facts.

Be thoroughly prepared to present the board's case and to answer questions. The board negotiator should have ready all the facts, including statistics, bargaining history, comparability data, or even anecdotes. The negotiator who presents facts to justify his position makes the board's proposal more acceptable.

The following dialogue involves a discussion of a board proposal to eliminate personal leave on Mondays, Fridays and days close to holidays.

Union Negotiator: How can you possibly expect us to give up a benefit we've had for the past ten years?

Board Negotiator: There are 18 districts like ours in the county. None of them has the wide-open personal leave language that our contract contains. And two that once had it have tightened it up in recent negotiations. That's the trend around here, and that's what we want to do.

Union Negotiator: What difference does it make to the board on what day someone is forced to take personal leave? If the emergency occurs on a certain day, that's when the personal leave must be taken. It shouldn't make any difference to you if it occurs on a Friday or a Wednesday.

Board Negotiator: You're right, because class coverage needs are the same on days adjacent to weekends as they are on days in the middle of the week. The problem, however, is that people have been abusing their personal days, by taking them before and after weekends and holidays to extend their time off.

Union Negotiator: Maybe, but how do you prove that? How frequently does that really happen? Aren't you making a big deal about nothing at all?

Board Negotiator: Here is the summary of personal leave usage. The records show that 75 percent of personal leave is taken on Mondays,

Fridays, or days adjacent to holidays. You have to agree that the kinds of incidents appropriate for personal leave occur randomly throughout the week. So when we see a disproportionate amount of personal leave days used on Mondays, Fridays, and around holidays, we know that teachers are taking those days for reasons other than those called for in the contract.

The board negotiator may not convince the union to agree to the entire proposal, but he has at least established that the district has the worst clause in the county, that other similar districts have recently tightened up their personal leave language, and that a disproportionately high use of personal leave occurs on Mondays, Fridays and days adjacent to holidays; thus, a substantial factual basis supports the board's position.

The board negotiator must be sure that the union understands his presentation of the board's proposals. Studies show that even when someone speaks directly to them, most people do not hear everything, particularly in a formal setting like bargaining. This is called selective perception. It is like skimming with the ears. A person often hears what he wants to hear and forgets quickly what he finds unpleasant. The board negotiator making a proposal should be sure that the union team hears and understands his entire presentation. He should ask questions such as, "Is that clear? Are you sure you understand my proposal?" Too frequently the union negotiator will say "Oh, sure, sure I understand it," when, in fact, that is not the case.

Because the union negotiator is unlikely to fully understand the board proposal, the board negotiator should repeat it. *Repetition is the only way the board negotiator can know that the union understands the message he is trying to get across.* The board negotiator could paraphrase or summarize the proposal, to make it sound a little more interesting the second or third time. He should also repeat his explanation of relatively complicated issues until he is convinced that the union team has heard and understood it. This repetition applies to the specifics and to the importance of the board's proposal. In addition, the repetition helps convince the union that the board is committed to its proposal.

REACTING TO THE UNION'S PROPOSALS

Personalize the acceptable. Suppose the union negotiator offers a proposal or counterproposal that the board negotiator accepts. The board negotiator should say to his union counterpart, "That's a very nice job. You have obviously put some thought into this, and I appreciate that. I also appreciate the fact that you are recognizing our concerns here, too." A compliment helps to maintain a good working relationship and may help the negotiations over some rough spots down the road.

In contrast, should the union negotiator offer a proposal that the board

negotiator cannot accept, the board negotiator *should not* say, "Dumb proposal." He should say, "It's impossible for us to accept this for these reasons..."

The board negotiator should not attack the source of the union proposal, who might be forced to defend his proposal with even more vigor, because the attack may threaten his pride and reputation.

The following dialogue includes a discussion of possible changes in a very liberal tuition reimbursement clause in the current agreement. The board negotiator has proposed that tuition reimbursement be available only for courses that are directly related to a teacher's present position. The union negotiator has a counterproposal.

Union Negotiator: *We have a counterproposal. We can accept a limit on tuition reimbursement to a) graduate or undergraduate courses directly related to one's present teaching responsibilities, or b) courses that are part of a matriculated program toward a graduate degree in education or the liberal arts and sciences.*

Board Negotiator: *We're very pleased that you are able to see the problem in this area and that you were able to come up with a realistic and practical counterproposal. It continues to provide a good benefit for the staff, but it also helps us to control costs and to share tuition reimbursement money among those staff members taking courses that are most beneficial to the children in the district. I think your counterproposal is a very fair approach, and I think we can sign off on it right now. I think it's a real nice job.*

The board was going to accept the proposal anyway. The board negotiator could have quickly signed off. Instead, he created a more comfortable situation, which may earn him dividends later on a tougher issue.

Depersonalize the unacceptable. The next dialogue discusses a union demand for payment for unused sick leave upon retirement. The union negotiator is trying to convince the board that a payment for unused sick leave plan is mutually beneficial.

Union Negotiator: *We're certain that payment for unused sick leave will substantially reduce absenteeism. An employee will obviously be careful about using his sick leave when he knows he can cash it in later on. Logically, wouldn't you?*

Board Negotiator: *I think you're right; logically, you'd expect that to happen. It's interesting, though, that all the research shows that it doesn't work out that way. Two recent studies completed at top American universities have studied this question and have found that this payment has no effect at all on sick leave use. The reason is that sick leave abuse does not involve 90 percent of the staff taking a couple of unnecessary days off. Instead, it involves 10 percent of the staff taking all the sick time they ever get, year after year. These sick leave abusers are not affected by the*

promise of a payment ten years or fifteen years down the road. I have copies of the two articles with me that I can let you have. I wish they would get greater publicity, because they show that what you might think as being obvious or logical isn't always the case. In fact, I used to think that payment for unused sick leave would affect absenteeism. But these articles showed me that I was wrong.

The board negotiator used objective facts to refute the union negotiator's argument. His statement that "even I thought your logic persuasive before I had the facts," depersonalized his rejection of the clause, and made it easier for the union negotiator eventually to withdraw the proposal.

Demand an explanation of the benefits to the district of the union's proposal. The board negotiator should state his skepticism if he does not see any benefit in a union proposal. The union negotiator may respond, "oh, come on, it is obvious." The board negotiator should not back down. The union always has the burden to prove that its proposal is in the district's interests. The board negotiator should also not allow his counterpart to frighten or intimidate him, or make him feel stupid when he asks, "What's in it for the district?" If the board negotiator does not see any benefit in a union proposal, he should not hesitate to say so.

A union proposal may quietly disappear if the board negotiator can rebut a union claim that its proposal is mutually beneficial. Of course, some union representatives might answer quite candidly, "There is *nothing* in it for the board. I'm not here to get the board anything, I'm here to get something for my people." His proposals might not disappear, but they can now be easily rejected.

In reviewing the union's proposals, the board negotiator should *repeat his understanding of them*. If he misunderstands the proposals, the union negotiator will clarify them. Suppose the board negotiator incorrectly paraphrases a union proposal. If the union representative says "yes, that's what we meant," the board negotiator can conclude that the union is not very committed to that proposal. After all, its negotiator did not even recognize the board negotiator's error.

Keep the other party talking. It is generally better to listen than to talk. The more the union negotiator talks, the more information the board team gets. This applies to the substance of the demand as well as the priority that the union places on it. The information that the union gives enables the board to present a counterproposal to meet the union's real needs. The counterproposal may be a much simpler clause than the one the union originally proposed.

Because the board negotiator wants the other party to keep speaking, he should ask open-ended questions such as "Please give me some more details on the problem," or "I still don't understand what you really want here."

The board negotiator must remember that the winner in bargaining is not the person who ends up talking more. That person is probably giving away information which hurts, not helps, his side.

In addition, the act of listening shows that the board empathizes with the union and conveys the impression that the board takes the union seriously. This gives the board an advantage throughout bargaining. Sometimes the union makes a proposal on behalf of one union member. All the board team members should do is invest an hour just to listen, empathetically and sincerely, with their eyes straight on the union spokesperson. That may be enough to satisfy that union demand. The union negotiator can then say to that union member, "We fought for you, and we made them listen to your complaint, but I'm sorry, we can't get it for you this year." Listening can gain the board some concessions and can certainly get the board a great deal of information without any cost, except time.

Try Supposals. The board negotiator can use two kinds of "supposals" when he reacts to the other side's proposals. One type of supposal involves the trade-off tactic. "Suppose my side were to agree to this—what could your side do for me? I don't know if the board will go along with me, but if I could get them to agree to your proposal, what could you do for the board?" If the union representative answers, "Nothing, I'm not here to do anything for you," the board negotiator should tell the union that an agreement is very far away. If the union representative says, "Well, if you could do *something* on increased personal leave, we could attempt to meet your concerns about the size of the sick leave allowance," agreement may still be possible. The board negotiator may not get exactly the trade-off he wants, but he knows that the union will seriously consider some type of trade-off.

Another type of supposal involves a partial trade-off. "If we were to meet you halfway on this, would that meet your need?" Should the union representative come back and say, "No, it is all or nothing at all," then the board negotiator knows that this is a high union priority. If the union negotiator says, "Yes, anything in this area would be nice. We would love to achieve our entire goal here, but we really need *something* in this area," then the board negotiator knows that the union will accept nearly any compromise position. The board may eventually give the union something, but it will now be much less than what the union originally asked for.

One caution regarding supposals. If a board negotiator says, "Suppose I conceded on this, what would you do for me?", he can never again claim that this issue remains a matter of principle; now, it is just a matter of horse-trading. Suppose he says, "If the board agrees to your agency shop proposal, would the union agree to tighten up the binding arbitration clause?", he cannot later say that "the board opposes agency shop as a form of taxation without representation!" The principle is no longer at stake. Now it is just, "What will the union give to get the board to

agree to agency shop?"

Ask leading questions. One simple reaction to an initial union proposal is to ask the question: "What else?" The answer may elicit other useful information that the board team did not originally have. This same question has value when the union negotiator makes a counterproposal; for example, he may say, "We will modify our position on personal leave and on additional sick days, and we'll agree to your proposal on work hours." The board negotiator should immediately ask the union negotiator, "What else?" The union negotiator might say, "and we'll give you this, too." Thus, the board negotiator has achieved additional movement at absolutely no cost.

The board negotiator may also react to a union proposal by asking, "Do I know everything I need to know on this issue?" He should ask this question directly and innocently. The union representative may respond, "Well, in fact, I assume you know this, too..." The question forces the other side to "open up," which may provide additional information that the board team can use to develop its best counterproposal; however, the additional information may convince the board that it should not counter-propose at all.

REJECTING THE UNION'S PROPOSALS

The board negotiator will always reject some union proposals, which will probably upset some union negotiators. Nonetheless, certain techniques can make the union better accept the rejection and also protect the board's bargaining position at the same time.

Never say never unless... A board negotiator generally should avoid saying "never" to a union proposal. The following dialogue, which concerns a union proposal for additional personal leave days without reasons, highlights the problem of using the word "never" in negotiations.

***Union Negotiator:** Let me repeat: This is a very important demand for us. We are tired of being treated like children, who have to bring a note from our mothers whenever we're absent. Besides, it is an infringement on our privacy to have to describe our personal needs to you whenever we have to stay home. All we want is two additional personal leave days, available without our having to give a reason for the absence.*

***Board Negotiator:** The purpose of personal leave is to give teachers a day off when an event arises beyond the employee's control. What you want to do is transform personal leave into vacation time. That's ridiculous! We will never agree to personal leave without a list of specific reasons as to why that leave can be taken. We will never agree to personal leave with no reasons whatsoever. You may as well withdraw that proposal right now. This is a matter of principle with the board. We are not going to compromise on this.*

Union Negotiator: *You seem to misunderstand the importance of this demand to us. I'll tell you what we can do. You now provide teachers with up to 12 personal days per year, for bereavement, illness in the family, court appearances, legal matters, and other reasons. We wanted two more days without reasons to be given. We're willing to agree to a total of three personal days to be taken without having to give reasons. For that, we'll agree to remove from the contract all the other types of personal leave that are now in the contract. That's how much we want this demand.*

The board might want to agree to the union's counterproposal, which would reduce the total amount of paid time off during the course of the year. And the school administration could avoid the administrative work associated with all these other personal leave categories. But if the board negotiator agrees to this counterproposal, then he loses any credibility should he again use the term "never." And if the board negotiator does not agree to this counterproposal, he has lost an excellent opportunity. Instead of saying "never," the board negotiator could have said, "It's impossible under the present circumstances for me to agree to that," or "given all your other demands I don't see how I can possibly do that."

Two exceptions to the general rule about "never say never" involve negotiations concerning an illegal topic of bargaining or a matter of principle. If the board team believes that it will never agree to agency shop as a matter of principle, then it should let the union know that "never means never." The same is true for illegal topics of bargaining.

When rejecting a proposal, state any conditions that would change your position. For instance, "I can't accept what you are proposing, because of these reasons, but I could if you made these changes..." The board negotiator should state those conditions very clearly, so the union knows what it must do to get the board to agree. If the union meets those objections, the board then has a moral obligation to accept that modified proposal.

Say "no" when you really mean "no". If the board's answer to a union proposal is a flat "no", the board negotiator should say so. He should not say "maybe", because "maybe" means possibly, and the union will interpret that word to mean that it still has a chance to get the board to agree to that proposal.

This dialogue examines a union demand for binding arbitration over board policy affecting terms and conditions of employment. The board is absolutely opposed to it and has told its negotiating team, "no movement, whatsoever." The dialogue begins with the board negotiator reacting to the union's proposal.

Board Negotiator: *I don't think, given the present broad arbitration clause, and the extent of board policy that would now become arbitrable, that we can agree to your proposal.*

Union Negotiator: Tell us exactly which board policies concern terms and conditions of employment, and we'll specify that only those policies are arbitrable. And if you have a problem with the present arbitration clause, then tell us what that problem is and we'll address those concerns.

Board Negotiator: I can't even tell you which policies would be affected, because they are so open to interpretation. And frankly, our board policies are all over the place.

Union Negotiator: Okay, we'll agree to establish a committee to study board policy for a year and the committee will determine which policies concern terms and conditions of employment. And then we'll have binding arbitration over those policies only in the second year of the contract, after the committee has made its report.

Board Negotiator: Well, we're really afraid that we will end up having 20 arbitration cases a year over board policy. You could harass us to death. And your state treasury has a lot more money than we have to pay for those cases.

Union Negotiator: We'll agree to a limitation on arbitration over board policy to two per year. And we will pay the arbitrator's full fees in those cases.

If the board continues to disagree, even though the union keeps meeting every objection, the union team has a right to be angry. The board is misleading the union. The union assumes that each time it makes a concession it is getting closer to an agreement when, in fact, the board team can never agree to the union's proposal. The board negotiator should have informed the union team that his team cannot agree to this proposal, and insist that the parties move on to another issue.

Explain the rejection. A reasonable explanation for rejecting a union proposal may satisfy the team member or the small group of teachers pushing the proposal. It also shows the board's good faith.

When rejecting the union's proposal, emphasize the negative aspects of the proposal to both sides. A union once presented a salary guide with \$1000 increments at the top of the guide. Thirty percent of the unit were on the top step. The board negotiator said,

Let's assume we agree on 7 percent raises over the next six years. The 30 percent of the unit at the top of the guide will demand a full 7 percent. The teacher moving to the top of the guide in the first year of the contract will get a \$1000 increase on top of that 7 percent. Consequently, in the second year of the contract, we'll have a \$2,000 balloon step at the top of the guide. And the group at the top is getting larger, so they will again demand a full 7 percent raise next time; then we will have a \$3500 balloon step. Four years from now, it will be a \$5000 balloon step. Eleven employees will be moving to the top of the guide that year, and these 11 people will get \$55,000 of a \$150,000 package. That won't leave too much for the rest

of you. That kind of a guide has as many problems in it for you as it does for us. We need a different kind of a salary guide.

After the board negotiator pointed out the negative aspects of the union's guide, the parties quickly agreed to a longer guide with smaller increments.

On saying "no". The best way to say "no", if at all possible, is to blame the other party for the negative response. If the board negotiator rejects the union's proposal and says, "It's impossible, given your other demands," he is not assuming fault for saying "no". Should the board negotiator paraphrase his rejection this way, "I don't see any benefits to the district in this," he is blaming the union's proposal for the rejection. "I'm not persuaded there is a real need here," can be another effective way of rejecting the union's proposal.

Many union proposals reflect the concerns of one or two people, or of small groups, arising from a single incident in one building involving one administrator. A board negotiator who relates a union proposal to their description of the problem, and to his own information about the problem can frequently say to the union negotiator, "I'm not persuaded that your proposal meets the needs that you are describing here; consider this instead..." Again, the blame falls on the union for making the proposal.

CONTROLLING THE DISCUSSION

The board negotiator who controls the discussion is better able to convince the union to accept the board's position, or get it to reduce its demands. If he desires to discuss the matter more, he should ask questions to keep the union side talking. Open-ended questions, such as, "why do you think that is so," or "how do you think this will help," or "explain again your intentions," stimulate lengthy discussion.

The board negotiator who wants to end discussion on an issue should ask questions requiring "yes" or "no" answers, or ask very specific questions, such as "when did that happen" or "who did that happen to?" He occasionally can get away with the following questions: "Isn't it obvious that..." or "only a fool would think otherwise, right?" But be careful: these questions can provoke a hostile response.

Change topics to avoid a stalemate. There is no point in beating the proverbial dead horse. A board member may certainly say, "We are not agreeing to this proposal. I don't know if we ever will but it certainly isn't going to happen tonight. Let's move on to another issue." Sometimes, the issue never comes up again.

A caveat! After the parties have reached final settlement, the union may try to raise a forgotten issue. The board negotiator should take a very tough position, opposing such a move:

Listen, my friend, you haven't talked about that for three months. I can't

believe it is important. We're not going to agree to put it into the package now. If I knew that was still on the table, I wouldn't have made the other concessions. If you truly want a settlement, take the settlement we have just worked out. Don't bring up these dead issues; save them for the next negotiations.

After the union has officially withdrawn a proposal, the board should not let the union reintroduce it. But suppose the union has simply stopped talking about it for a while. The board can still try to keep the proposal from reappearing at the end of negotiations.

Board negotiators are often too susceptible to such "nickle and dime" tactics because they are afraid to say "no" when settlement is so close. Even though they may be afraid that the settlement might fall apart, in fact, the settlement will probably not fall apart. A union that has not argued on behalf of a proposal in three or four months cannot attach that much importance to it. The board negotiator must take a tough position on the settlement package and strenuously avoid negotiating further "nickle and dime" issues.

Silence. Silence may be an effective response to a union proposal. The board negotiator should not raise an issue that the union has stopped talking about. The board negotiator should also not debate an issue he knows he will lose. If that is the case, he should simply switch topics. Finally, some union proposals may appear silly and frivolous, even though, the union rants about their importance. Sometimes, the board negotiator should not even respond to a silly argument, but just say, "let's go on to another item where I think we can be more constructive."

Responding to threats and insults. Threats involve union actions to strike; to come to a board meeting, en masse; "to go to the public"; or not to participate in extra duties, to name a few. A threat implies, "I'm going to try to beat you somehow. I'm tired of persuasion. I'm going to try to use raw power to get you to do what I want you to do."

The board negotiator can respond to a threat in at least one of several ways.

- He may ignore the threat, if it is innocuous or unrealistic, but particularly, if it stems from frustration.
- He may ask the union negotiator for a clarification. "What do you mean by action in September?" The union negotiator may respond, "why, I didn't mean anything like a strike, I just meant that the members are going to be upset." The request may force the union negotiator to reveal that his threat is not serious.
- The board negotiator may state that the union will be hurt *more*. "If that is what you want to do, I just want you to understand exactly what our response will be." Of course, the board negotiator must show that he can impose a penalty on the union, showing that the balance of power favors the board.

- The board negotiator could call the bluff. In one small district recently, the union negotiator said, "Well, we may have to strike over this." The board negotiator replied, "I've been in 15 strikes during the past four years, and if you feel you have to strike, that's okay with me. That's your decision, whatever you have to do, you have to do." The union negotiator was so certain that the board team would buckle under at the thought of a strike that he made the threat without thinking. When the board negotiator's response was, "it's your decision, do what you have to do," the strike never came up again.
- He can acquiesce. When the union holds all the cards, there may be no alternative. The board negotiator should try some other responses first; however, if he must concede, the concession should be timed so that it does not appear directly tied to the threat itself. If it is apparent that the board acquiesced because of the threat, the union will know that its threat forced the board's hand, and will probably use a similar threat in the future.

The board negotiator who is threatened should *not* walk out of the room, and stop bargaining. He may rightfully say, "Threats are not going to help us get a settlement," or use the other responses discussed earlier. He should not stop the bargaining process, however, because that reaction plays right into the union's hand by projecting the board as hard-nosed and intransigent.

How does the board negotiator respond to an insult at the table? He should not sit there and steam over it in silence. He should react to an insulting remark about him, or the board or the administration by saying: "I find that to be a very insulting statement. It is not good for bargaining. There is no need for us to get into those kind of personal attacks. It is not going to help us get a settlement; I think it is going to hurt. Let's get back to the issues and stay away from insulting remarks." That may deter further insults. Even if it does not, the bargaining must continue. But there is no value in remaining silent in order to maintain some decorum at the bargaining table, in the face of personal attacks.

Avoid unneeded controversy. Bargaining requires negotiators to be sensitive to their adversaries as well as to their allies. They should be careful to avoid statements or jokes that one side or the other might find offensive. Off-color remarks, racial or ethnic jokes, and political or religious opinions can irritate many people. Enough controversy exists at the table without needlessly sparking more with a well-intentioned remark that someone on either side of the table takes personally.

Smokescreens. On a somewhat lighter note, Richard Neal has compiled the following "smokescreen tactics."¹ Although the last one is sub-

¹Neal, Richard, *Bargaining Tactics: A Reference Manual For Public Sector Negotiations* (Richard Neal Associates: Box 23, Manassas, Virginia), pp. 215-216.

ject to some interpretation, the rest are basically delaying tactics that negotiators occasionally use.

- Deny that the problem exists.
- Create a bigger issue.
- Find a scapegoat.
- Set up a joint committee
- Agree to study the matter.
- Lose needed materials.
- Sue somebody.
- Introduce a counterproposal on a related issue.
- Get sick.

SUMMARY

Oral communications can be an important factor in attaining bargaining goals. Negotiators may use various techniques as they present their proposals, react to the union's proposals, and reject the union's proposals. Negotiators may also use techniques for controlling discussions at the bargaining table. Persuasiveness, perseverance, patience, charm, face-saving, timing, intelligence and good humor—the effective negotiator must possess these characteristics and more.

INTRODUCTION

Mediation is the first of two impasse resolution procedures that the law provides. The second is the more formal, more structured factfinding process. "Settlement is the name of the game," in mediation, as it is in factfinding.

If the parties voluntarily reach a settlement, the mediator has done his job. But board negotiators must remember that the mediator does not settle the contract—the board and the union settle it. The mediator is merely a facilitator who helps the parties agree to a new contract. School board negotiators need to be familiar with the mediation process, because it can work to their advantage and help them accomplish bargaining goals that they did not achieve in direct, face-to-face bargaining.

ASSIGNMENT OF MEDIATORS

PERC assigns a mediator at the request of one or both parties. PERC employs seven, full-time staff mediators, and also uses the services of a panel of approximately 30 *ad hoc* mediators. These *ad hoc* mediators may either be full-time neutrals, or professors and attorneys who mediate part-time.

Even though PERC will usually assign a mediator at the request of only one party, the Commission staff realizes that sometimes mediation, if it begins too early, may not be productive; it may even be harmful to the parties' relations and to the chances of settlement. A school board should inform PERC if the union's request for mediation is premature. Many times the parties simply have not met often enough. If the board objects to the union's request, PERC may then encourage the parties to meet a few more times before it appoints a mediator; however, if the union insists, PERC will probably comply with the request and assign a mediator. Often a mediator who is called in to a dispute too early will meet once with the parties, and then ask them to renew direct negotiations and call him when they are actually at impasse.

PERC does not charge for the mediator's services. Mediators nor-

mally will meet with the parties for no more than three sessions. After two or three unsuccessful sessions, the mediator usually recommends that the parties proceed to factfinding.

All PERC-appointed mediators specialize in public sector negotiations; however, school boards should not expect mediators to know anything about their districts. Board negotiators should educate the mediator about their district and how it is different than the other seven districts he may have worked in during the past three weeks.

PERC does not formally evaluate mediators, but does rely on "reports from the field," both formal and informal. Board negotiators should notify PERC about an ineffective or tactless mediator, especially if he has betrayed a confidence during the course of mediation.

ROLE OF THE MEDIATOR

The mediator is acting on behalf of a specific public policy: labor peace. That is the only public policy he is concerned about. He has no interest in a thorough and efficient education for children. He has no interest in the district's fiscal predicament or in the needs and demands of the taxpayers. If a proposed package will produce a settlement, he will push for its acceptance. The mediator does not care how foolish acceptance of that package might be, whether the settlement contains illegal provisions, or whether it is framed without regard to the long-term implications for the district. The mediator simply will not protect the district's interests. He has his own professional agenda to attend to—settlement, plain and simple. A district must attend to its own agenda, with the district's short and long-term interests in mind.

A mediator is a negotiator who does not have any interest in the terms of the settlement. He uses many tactics that professional and experienced, nonprofessional negotiators use, and throws in some unique to his status as a neutral. Keep in mind that the mediator uses his tactics on both sides. These tactics are not evil or devious. They can work well when used well. Board negotiators must always remember that the mediator wants neither the union nor the board to win; he merely wants a settlement.

The mediator will engage in a variety of activities, some procedural, others substantive, but all linked to his goal of getting a settlement.

Scheduling Meetings

The mediator will usually act as a go-between to find a mutually acceptable mediation date. This gives him the opportunity to speak privately and off the record with the negotiators. Some mediators, on the other hand, ask the parties to decide on a list of acceptable dates and transmit the list to him, believing that any conversations between the parties may help to get a settlement.

The mediator may discover that the timing is not right for a quick settlement because not enough pressure exists on the parties at that time or because they need a breather to let emotions calm down. Should that be the case, he will schedule the next meeting at some distant future date.

Recessing Meetings

Timing is as essential in mediation as it is in bargaining. The mediator will control when the meeting ends according to his assessment of the chances for settlement that evening.

A mediator who quickly adjourns a meeting is telling the parties that he thinks at least one of them is not serious about settling. When he adjourns the meeting, he may also remind them that this dispute is theirs, not his, and they, not he, need the settlement. This is a mediator's way of threatening to abandon the parties to their own devices (which, of course, have already proved wanting because the parties are at impasse). This tactic is intended as a catalyst to push the parties into more movement and compromise.

The mediator, however, may decide that it is necessary to adjourn the meeting early. It may be the wrong night for settlement, and further mediation would be wasteful. In addition, the mediator who insists that the parties remain, even though there is no likelihood of progress, might damage his credibility, and unintentionally cause the parties' to harden their positions.

More commonly, the mediator will not recess the session until very late in the evening or until the parties settle. The lateness of the meetings is necessary for several reasons:

- he needs time to apply his mediator's "bag of tricks";
- he has only three meetings; these may need to be long meetings to settle complex issues;
- he realizes that fatigue changes perceptions as to what the parties believe is important; and,
- he knows that as the night wears on and the deadline of the next day approaches, the pressure to compromise often builds; perhaps, it is the last day of school, or the first meeting of the school year, or it is the Sunday night before a district enters another week of a strike or before the union appears in court to answer contempt charges.

Changing Locations

In a crisis situation, a mediator may decide to move the negotiations to another site, usually a neutral location such as a hotel. This move helps to reduce both the pressure of the media and the tension of pickets outside the administration building. It also can create a little insecurity for the party that has left its home base, e.g., the board offices, and who now

has to operate in an unfamiliar setting.

Establishing the Agenda

The mediator will control the order in which the parties discuss the issues. He can now discover the priorities of the parties, eliminate the less important issues from negotiations, and create the impression (and therefore to a large degree the reality) that he is in control of the entire bargaining process.

Separating the Parties

All mediators eventually separate the board team from the union team, placing each in separate rooms. This is a useful technique:

- It diffuses the tension between the parties.
- It permits the mediator to openly discuss with each side the unresolved issues, including the motives, actions and personalities of the other side.
- It allows the mediator to challenge the position of one party without embarrassment.
- Most importantly, it helps the mediator to achieve full knowledge of the real positions of the parties, because each party will tend to move off its last position "for the mediator's information only" when it would never do so in front of the other party.

Separating the parties is a proven mediation tactic; board negotiators should not discourage it. The mediator can now control communications and the flow of information between the parties. After he has separated the parties, he will probably not bring the full teams together again until the parties have reached settlement.

Chief Spokesperson Meetings

After he has separated the teams, the mediator will often call each chief spokesperson out into the hallway or to wherever the mediator has established his "office." The mediator may feel out each side's positions and identify areas where either side can make some, little or no movement.

The mediator may meet jointly with both spokespersons, or he may meet separately with each spokesperson. In either case, the spokesperson can usually be somewhat more candid in such private meetings than in a group session.

Ascertaining Priorities

The most important function of the mediator is to discover what each side wants compared to what it really needs. A union frequently declares impasse because it needs a tactful way to withdraw its many minor demands, and knows that the mediator will quickly suggest the removal

of all "non-essential" issues. After the mediator separates "wants" from "needs," he can begin to work on pulling together the items required for a settlement. Should he fail to properly distinguish wants from needs, however, he will never help the parties reach agreement.

The mediator uses the same tactics to ascertain priorities as those that negotiators use in direct negotiations: probing questions, repetition, packaging, timing, etc. The successful mediator must properly use these tactics to determine which proposals are necessary ingredients to a settlement, and which are desirable but dispensable.

Assessing The Rigidity of Positions

The mediator's private conversations make him an important resource person. He can tell the union that, "a cap on tuition reimbursement is *very* important to the board." He can tell the board that the union did not mean "it would never agree to restrict personal leave use," but only that the board would have to pay a great deal to get the union to agree to this restriction.

The "supposal" method is another useful way that a mediator gets this information. It works as follows: "suppose the union was willing to do this and so, would the board be willing to do this and that?" Board negotiators should be willing to speculate in this fashion with the mediator, but they must be sure that the mediator will respect the confidentiality of these discussions. The value of a "supposal" is that no one, not even the mediator, is committed to it. The parties can speculate without modifying their official positions or without making a commitment they might later regret.

Deflating Extreme Positions

"Never" almost always becomes "maybe" in the right context. A mediator must try to move the parties off their desired, but extreme, positions, to bring them closer to each other's true needs. This situation often demands that the mediator use high-pressure tactics, because he must move the board or the union off a firmly held position.

Mediators can be rough on both sides. They may accuse boards who ask for "givebacks" of being unreasonable, selfish, irresponsible and insane.¹ Likewise, mediators may attack union demands for substantial salary raises and new medical fringe benefits in each year of the new contract as "pie-in-the-sky" and ridiculous. This leads to the following general rule: "The more time the mediator spends with the union, the better off the board is."

This high-pressure tactic should only be used privately between the mediator and team he is working on. Should he use it in the presence of

¹"Givebacks" are major union concessions, which eliminate some employee benefits or administrative restrictions from the contract.

the other party, both parties will probably become more intransigent. Should the mediator attack the board's position in front of the union, for example, the union may conclude that its position has been vindicated, and refuse to consider compromises in the future. Naturally, the board will rise to defend its position, rather than lose face before the union. The board might then also become unwilling to compromise, even if it had the authority to do so before the mediator's outburst.

Creative Suggestions

A mediator may occasionally suggest an idea that neither party has ever thought of, which might be the key to a settlement, such as these actual cases:

- A school board refused to grant binding arbitration on the grounds that the present system of advisory arbitration was perfectly satisfactory. The board's position was that if the arbitrator was fair, the board would abide by his advisory award. The mediator knew that the union was skeptical of the board's future actions. He suggested that the advisory arbitration clause remain with this provision: if the board failed to abide by three advisory awards during the life of the agreement, all future awards would become binding! Both parties accepted his suggestion.
- Binding arbitration was again the stumbling block in another negotiations but for a different reason. The board feared that the union would use the arbitration process to take all grievances, even the most frivolous ones, to arbitration, to harass the board. The mediator suggested that the parties agree to a "loser pays" clause: whichever side lost the arbitration case had to pay the arbitrator's entire fee. Both sides, confident that they would never push a weak case to arbitration, accepted the mediator's recommendation.

Packaging

School boards and unions use this tactic; so do mediators. After some time, the mediator knows both sides' priorities and softspots. But neither party has all the information that the mediator has. From his private storehouse of knowledge, the mediator can frequently fashion a package containing enough "goodies" so that both sides begrudgingly can accept it.

A mediator's package is not without dangers. If the package ignores an issue that one party ranks very highly, or includes an issue that another party vehemently opposes, the mediator may lose his credibility. He may thereafter be seen as pro-union or pro-board, and may henceforth be ineffective. Therefore, many mediators use the "supposal" approach. They will only offer a "mediator's settlement proposal" as a last ditch effort, or where they are certain that both sides will accept it.

Highlighting the Costs of Disagreement

Mediators do not spend much time with either party selling the mutual benefits of the other side's proposal. They seem much more comfortable as doomsayers, encouraging the parties to compromise by highlighting the negative aspects of continued disagreement, such as:

- "starting school without a contract is bad for employee morale";
- "if we don't wrap this up tonight, I cannot promise that old items that the other side previously withdrew might not reappear on the table";
- "if we fail to settle tonight, these negotiations may drag on forever";
- "if you delay agreement, the county average settlement will increase, because the highest settlements always come in last";
- "if you have to go to factfinding, you never know who the factfinder will be or what he will recommend; settle tonight, because the devil you know (me) is better than the devil you don't know";
- "nobody wins a strike."

All these statements are not necessarily true; their accuracy depends on the situation. But the mediator who says them at the right time and in the right manner, can make them *sound* true, which may move the parties to settle their differences.

Bargaining During Mediation

The mediator first tries to gain the trust of both sides. Should either side not trust him, he has no value in that situation. The mediator will promise to respect the confidentiality of any information that the board gives him. A good mediator will never disclose a board's position to the union without first obtaining the board's permission. Should he betray a trust in a certain district, he may lose his effectiveness there. And should he do the same in other districts, he jeopardizes his acceptability as a neutral throughout the state.

Should the board negotiator give the mediator his "bottom line" when he asks for it? Not necessarily. He has to earn that information. Trust is one way he can do it. Board negotiators may eventually discover that the mediator misunderstands the issues, or that he "shoots from the hip." If either is the case, the mediator may "inadvertently" disclose information that one party has given him in confidence.

The mediator must satisfactorily establish his credibility and integrity. At that point, board negotiators should give the mediator their best offer, but do so only slowly and incrementally. They should reveal their positions faster than they might reveal them to the union, but they should also withhold something as a final sweetener. The board, as well as the mediator, may need it later.

Board negotiators should also heed the following advice during mediation:

- *Do not* be bullied. Remember that the mediator *cannot make* the board do anything it does not want to do.
- *Do not* agree to something the board or the school administration cannot live with. The mediator does not have to live with the agreement once the parties sign it, but the board does. The board, not the mediator, is responsible to the district, the community and the children.
- *Do not* attack the mediator personally, because the board needs him to help get an agreement. But do not be pushed around either.
- *Do not* ignore your knowledge of tactics. Board negotiators should move slowly, demand trade-offs, and should not move twice without the union making a counter offer.

A mediator is especially useful when he knows that the board negotiator cannot or will not improve the board's offer, but is still willing to sell a compromise position to his negotiating team or to the entire board. A mediator who "gets the offer" from the union, can set up a settlement offer that the board will accept without actually increasing the board's official offer. Should the mediator be unable to get the "offer" the board wants from the union, the board still has retained its flexibility and bargaining position.

SUMMARY

Mediation should not intimidate school board negotiators. A request for mediation neither implies bad faith bargaining, nor does it indicate that the bargaining process has been irreparably damaged. Mediation is simply an extension of the negotiations process, and it may help the parties reach settlement.

Mediator tactics are not used equally. They are used more often on the weaker party. Board negotiators entering mediation should be prepared, should know their goals, should use their knowledge of bargaining tactics and, finally, should protect the districts short and long-term interests.

INTRODUCTION

There are two specific impasse resolution procedures available to school boards and unions. The first procedure is the less formal, less structured one known as mediation, discussed in detail in the previous chapter. The second procedure is factfinding, which normally occurs after the mediation process has failed to produce a settlement.

PURPOSE OF FACTFINDING

The purpose of factfinding, like that of mediation, is to get the parties to settle their outstanding differences and agree to a new contract. Factfinding, like mediation, is a non-binding process. While it has many of the same characteristics of arbitration, it is different insofar as the factfinder's recommendations are only advisory. Either party or both parties may reject any or all of the factfinder's recommendations. This major characteristic of factfinding distinguishes it from binding arbitration, where the decision is binding on the parties in disputes involving either "rights" (grievances arising under the terms of the agreement) or "interests" (unresolved issues in bargaining). The latter process of interest arbitration is mandated only for police and firefighters and their employers under Chapter 85, Public Laws of 1977. Thus, factfinding is much closer to advisory arbitration. In advisory arbitration, the arbitrator issues an award involving a grievance, but this award is *advisory* only. Neither side is obliged to abide by its terms.

In the years following the passage of the 1968 public sector bargaining law, many observers believed that factfinding would be an extremely valuable process for settling bargaining impasses. Their optimism was founded on the notion that the factfinder's recommendations would somehow have a coercive effect on the parties, even though these recommendations were, by definition, non-binding. These observers believed that the parties would view them as being reasonable and fair and would then largely incorporate them into their new agreement. In some cases, it worked that way; however, today the process has largely fallen into

disfavor and is being used with much less frequency.¹ Nevertheless, school boards should be familiar with the process, its assets and liabilities, and its likelihood of bringing about a conclusion to unresolved contract talks, because many boards still are involved in factfinding each year.

SELECTION OF THE FACTFINDER

The process of selecting a factfinder begins at the time when the parties (one or both) or the mediator assigned to the dispute believe that continued mediation will not resolve the impasse. The mediator, after his efforts at settling the dispute have proven unsuccessful, may request PERC's Director of Conciliation and Arbitration to invoke factfinding. The Director will generally accept the mediator's recommendation and so inform the parties. Alternatively, the parties may directly request factfinding. In either case, the Director sends to the parties a list of the names of three factfinders. Each side is requested to strike one of the three names appearing on the list and indicate by order of preference the remaining two names; this way, both sides will find at least one of the three factfinders acceptable.

The board, as well as the union, must respond to the Director's request no later than the close of business on the third working day after the date the list was submitted to the parties. If a party does not respond in time, the Director will assume that all the names on the list are acceptable (*N.J.A.C.* 19:16-4.3).

If the parties jointly request a particular factfinder or mediator, the Commission attempts to accommodate them. Occasionally, the parties may agree to use the mediator assigned to the dispute as their factfinder. This decision involves several considerations. Does the neutral still have the trust and confidence of both sides? Will his confidential discussions with each side compromise his ability to render a fair and impartial set of recommendations? Is the neutral's close familiarity with the dispute an advantage or disadvantage to the school board in factfinding?

The factfinding process, unlike mediation, involves some costs. Both the school board and the employee union must share equally in the cost of factfinding. These costs include the factfinder's per diem charge of \$250.00, plus additional charges for travel, hotel, and telephone expenses. These charges take into account usually a day for a hearing and at least one or two additional days to study the briefs of the parties and to prepare a set of written recommendations.

¹See Ronald J. Ianoale, *An Analysis of Fact-Finding as a Final Impasse Procedure in Settling Collective Bargaining Disputes Between Teacher Organizations and Boards of Education in New Jersey*, (Ed. D. dissertation. Temple University, 1980).

ROLE OF THE FACTFINDER

The function of the factfinder, like that of the mediator, is to help the parties arrive at a voluntary agreement; therefore, the factfinder will do whatever the parties believe he should do to achieve that objective. This often involves mediation, which comes naturally to most factfinders because they generally prefer the less formal mediation process to the more structured factfinding procedures. Moreover, if mediation is unsuccessful, the factfinder can conveniently slip back into the role to which he was originally assigned and begin the process.

Thus, the factfinder is often the second mediator in a negotiations dispute. He can play a critical role at a time when the new school year is fast approaching and the parties have not reached a new settlement. The parties may recognize the importance of a quick settlement after months of haggling and look to the factfinder for immediate assistance. This assistance can occur only if the factfinder mediates, because should he conduct a hearing, analyze briefs and prepare a report, another month can go by without a resolution to the dispute. During that time, tensions may increase to the point that the official factfinding effort may prove ineffective.

The neutral as mediator or as factfinder can be effective only if the parties are willing to use the process. In many negotiations, the parties welcome further mediation by the factfinder. But, in others, the parties need a factfinder's report, and discourage serious mediation. One party or both parties may need a factfinder's report as an integral part of their bargaining strategy.

Factfinding is generally invoked towards the end of the school year in which the current agreement is expiring or during the summer or early fall. By that time, the parties have probably been negotiating for well over seven months. The outstanding issues remain the focus of the parties' attention, and, of course, the factfinder's task.

Experienced negotiators are well aware that a factfinder's report may merely incorporate the parties' agreement reached prior to the factfinder's arrival or as a result of his mediation effort. This occurs if, for one reason or another, one party (usually the union) cannot ratify that agreement without the factfinder's stamp of approval. This scenario may occur for several reasons. First is the face-saving aspect. A party that has taken an unreasonable and unrealistic position in bargaining (and has gone public with it) may be able to back down from that position only if a "neutral, unbiased report" recommends a different result. Sometimes, a union boxes itself into a corner, and a factfinder's report may enable the union to gracefully move out of an untenable bargaining position. Other political considerations frequently exist. A union facing a membership with unrealistic bargaining expectations may need a factfinder's report to provide some "reality therapy" for its membership. A school board may be

in the same situation, this time with an irate citizenry who wishes to see the board hold the fiscal line. A report may enable the board's negotiating team to sell the agreement to those factions either on the board or in the community who believe that even an extremely low salary increase is excessive.

In most cases, however, the parties have not reached agreement when the factfinder arrives. Under these circumstances, the factfinder performs the following functions normally associated with the process. The neutral brings the parties together, and explains the process. He gives them an opportunity to present exhibits and explain their content. He allows each side to ask questions or attack the relevance of the other side's exhibits. He also asks his own questions, if need be. Finally, each party usually files a brief after the initial meeting, in which it restates its arguments, links them systematically to the evidence presented at the hearing, and rebuts the other side's arguments. On the basis of all the information received, the factfinder prepares a report with recommendations.

FACTFINDING CRITERIA

A factfinder considers four criteria as he reviews the exhibits and briefs of the parties, and arrives at his recommendations for a settlement. These are *acceptability*, *comparability*, *ability to pay*, and *the cost of living*.

Acceptability

The purpose of factfinding is to produce a settlement. A factfinder's report that either party is likely to reject is useless. Therefore, the most important criterion is *the acceptability of the report to the parties*. The exhibits, briefs and arguments help the factfinder assess *what the parties will find acceptable*. Experienced factfinders have often stated, "Fact-finding has nothing to do with finding facts! By the time factfinding commences, the parties are far more aware of the facts related to the dispute than the factfinder can ever hope to become aware of."

The factfinder may not find the validity of the data and arguments persuasive *per se*. But the data do have importance because they implicitly disclose each side's *commitment* to its various positions. The factfinder must be aware of these commitments when fashioning recommendations that each party will find *acceptable*.

The factfinder also considers the power relationship between the parties. He knows that the parties eventually settle on terms acceptable to the party with the most *bargaining power*. Therefore, he writes a report that the stronger party will find acceptable. He avoids being too one-sided, because he must also seek the acceptance, albeit reluctantly, of the weaker party. Nonetheless, his assessment of the relative power of the two parties largely determines his recommendations. Even if the parties do not

accept the report in its entirety, they may at least use it as the basis for an eventual settlement.

The factfinder never refers to this acceptability criterion in his report, but he applies this criterion very consciously. Boards that participate in factfinding must make their arguments and develop their strategy with this concept in mind.

Comparability

Comparability is one of the most difficult concepts in public education bargaining to define and apply. Parties should, but rarely do, agree on whether the employees in District A (be they custodians, bus drivers, secretaries, teachers or administrators) are, in fact, comparable to their counterparts in District B. The union often claims that comparability exists with whichever district it selects because "teachers are teachers"; however, that claim is an over-simplification. Although the union may argue that a teacher's or a custodian's job may be similar in different districts, the union may fail to point out that the districts themselves may not be alike. The board must then point out that District A is a poor, rural K-8 district, whereas District B is a wealthy, suburban K-12 district.

Comparability often takes on its own peculiar meaning depending on what the goal is. But objective ways of identifying comparable districts exist, and the factfinder is eager to receive not only the names of districts claimed to be comparable, but also the criteria by which they were determined to be comparable. Four criteria often used to determine comparability are geography, socioeconomic status, wealth, and enrolment group.²

Geography: In factfinding, the county in which the district is located is generally viewed as the geographic base-line. In a very large county, it may be more appropriate to limit the comparisons to a region or section of the county. When a district is located near its county boundary line, it may be reasonable to look for relevant comparisons across that line to similar districts in the adjacent county.

Socioeconomic Status: The New Jersey Department of Education has developed a classification system known as District Factor Grouping (DFG). The following variables, listed in order of their relative importance in the composition of the factor, include:

- the education background of the district's population;
- the occupational background of the district's population;
- the per capita income of the district's population;

²The comparability criteria described below are available from two annual NJSBA publications: *Collective Bargaining Data* published each February, and *An Analysis of Teachers' Contracts in New Jersey*, available each June.

- the percent of population at or below poverty level;
- the unemployment rate;
- the population density;
- the degree of urbanization; and,
- the population mobility.

All districts, except for those with enrollments of fewer than 300 students, have been classified, using a lettering system from A to J, A being a district like Newark and J being a district like Princeton Regional.³ Vocational districts are placed in a separate category—V. Districts labelled anywhere from A to J or V are divided for statistical use into five larger groups: Group 1—DFG A; Group 2—DFG B, C, D; Group 3—DFG E, F, G; Group 4—DFG H, I, J; and Group 5—DFG V.

Wealth: *Equalized valuation per pupil* is the most common measure of a district's wealth. This variable is a measure of the resources available in the district to support education. It is determined by computing the value of the taxable property of the district and dividing it by the resident enrollment of the district. For ease of comparison, the NJSBA places each district into one of four general categories:⁴

- Low—falling below the 25th percentile;
- Low/Moderate—falling at or above the 25th but below the 50th percentile;
- Moderate/High—falling at or above the 50th but below the 75th percentile; and
- High—falling between the 75th and 100th percentile.

Enrollment Group: Districts are also distinguishable because of the size of their student enrollment and their grade pattern. There are 11 different enrollment groups that the NJSBA, NJEA and the State Department of Education recognize. Five of the 11 are elementary (K-8) districts with enrollments of 1-499, 500-999, 1,000-1,499, 1,500-1,999 and more than 2,000, respectively. K-12 districts with enrollments of 1-2,999, 3,000-5,999, and more than 6,000 students make up three additional enrollment groups. Two groups include secondary districts (9-12) with enrollments of 1-2,999 and more than 3,000. Vocational districts, regardless of enrollment, make up the last group.

A district preparing for factfinding, or for that matter involved in direct negotiations, should be familiar with these four comparability criteria.

Suppose a district is comparable to three other districts in a particular

³Esther R. Strassman, *An Analysis of Teachers' Contracts in New Jersey 1981-82/1982-83*, (Trenton N.J.: New Jersey School Boards Association 1982) pp. 44 and 68.

⁴See *An Analysis of Teachers' Contracts in New Jersey and Collectible Bargaining Data* for this information.

county according to the criteria set forth above. Suppose further that the average teacher's salary in that district is lower than that in those districts. What does that say? It could say that the salary guide may be as competitive, but that the teaching staff is not as experienced. Thus, the average salary of the teaching staff, which is a function of the percentage of the people at or near the top of the guide, will not be as high as that of the teaching staffs in the other districts.

Even if there is a clear and unmistakable basis to say that a district's salary guide is not competitive, that district's average class size and student-teacher ratio may be lower; the workday and work year may be shorter; the working conditions may be more desirable, or the fringe benefit package may be more attractive. If this is the case, then the board should document these facts. The point is that comparability cannot be reduced to a single component when used in negotiations, mediation and factfinding.

Ability to Pay

The factfinder will probably have to deal with the "ability to pay" argument that each party presents. Perhaps the strongest factor in this regard is the district's budget cap.⁵ The cap is a percentage figure assigned to every school district in the state, and determines the extent to which the district may legally increase its school budget for the following school year. The cap is frequently lower than the total cost of the union's financial package. As a result, the district should argue that the cap prevents the board from agreeing to these exorbitant union demands. Should the board agree to the union's salary and other economic demands, the board might have to lay off employees because the new budget simply cannot have enough money to pay for all the union demands.

In a few districts, the cap is higher than the union's salary demands. Those districts have higher caps by virtue of a complex formula based on the premise that districts statewide should begin to approach an equalized level of per pupil expenditures. A 15 percent district cap does not exist so that the board will give its employees a 15 percent salary increase. It exists to give the district the flexibility to increase local taxes to raise the level of per pupil expenditures to approach the statewide average. The obvious drawback is that a 15 percent increase in the school budget, for whatever reasons, would significantly affect the local tax rate, a move that may be politically unpopular and financially undesirable. A board should tell the factfinder, for example, if local residents recently have voted down school budgets. This information could counter a union's argument that a high cap necessarily means that the board has a substantial "ability to pay."

⁵The reader should consult *An Analysis of Teachers' Contracts in New Jersey* and *Collective Bargaining Data*, two NJSBA annual publications for the cap of each school district whose contract has been analyzed.

The Cost of Living

Changes in the cost of living, as determined by the Consumer Price Index (CPI), are an important factfinding criterion. During periods of rapidly rising inflation, unions stress, while school boards play down, the cost of living factor. When inflation increases at a slower rate, school boards are in a much better position to refer to only modest changes in the CPI.

Even though both school boards and unions look to the CPI to measure changes in the cost of living, a fundamental distinction exists between the CPI and the cost of living. The CPI assumes the purchase of the same market basket of goods from month to month and from year to year. It may not accurately reflect the actual change in the cost of living of school employees, who may substitute a less expensive product for a more expensive one, or who may postpone making larger purchases. In addition, the CPI measures changes in the prices of certain goods and services; these changes may have only a very limited impact on school employees. For example, the sharply rising cost of medical care or new homes may not affect those school employees whose school boards pay the full premium for medical/hospitalization plans and who already live in their own homes.⁶

PRESENTING THE BOARD'S CASE

Considerable time and effort should go into the preparation of the board's case. Careless attention to detail could result in a report detrimental to the board's bargaining interests. A school board should observe the following general rules.

Identify all unresolved issues that will be the focus of the factfinding inquiry

Issues which either side has previously agreed to withdraw should not be part of the factfinder's investigation. The parties should identify those unresolved issues which gave rise to the current impasse, and only those issues should be considered in factfinding.

Data for each unresolved issue must be gathered

The board must be prepared to justify its position on all of its still active proposals. That burden likewise falls on the union with respect to its demands. The board should gather whatever data are needed to justify its proposals and to refute the union's demands. The board should prepare the data in the form of exhibits, which are clear, concise, and convincing. Ef-

⁶See Garry M. Whalen *et al*: "Caps, Inflation and Negotiations." *Negotiations 1981*, (Trenton, N.J.: New Jersey School Boards Association, 1980), pp. 11-15 for more information on the interrelationship of these three factors.

fective charts, graphs and tables justifying the board's position can also be very helpful. But note: factfinders are not impressed with voluminous amounts of data which say very little and mean even less.

Each board proposal requires ample supportive evidence, to increase the board's chances of convincing the factfinder to rule in the board's favor on that issue. If neighboring districts require their teachers to work one hour longer each day, the board should give this information to the factfinder. The factfinder needs this relevant information in connection with the board's proposal for a longer workday.

The board should offer evidence through exhibits showing why each and every union demand, as written, is unacceptable. A union demand for more preparation time may appear to have a sound basis when compared to the more generous preparation time that other districts grant their teachers. When viewed in the context of the length of the entire workday, however, the board may argue that the current preparation time allowance is more than adequate. Thus, the board may have to provide data which are indirectly related to the issue in dispute to counter a union proposal.

District Profile

Every factfinding presentation should contain a description of the school district and the communities that the district serves. This important information gives the factfinder a better understanding of the district. *Remember that the factfinder knows nothing about a district until the board tells him.*

Negotiations History

Occasionally, bargaining history will offer some insight into the parties' relationship. The factfinder may find it interesting that seven of the ten union demands before him have been on the table in previous negotiations. This information may give the factfinder the needed insight to determine whether the board will agree to any of them.

The factfinder should also know, for example, if teachers have recently made major economic gains in relation to their counterparts in other districts; of course, the board will have to prove this point. The corollary is that the board should not state anything as a fact that cannot be verified through the use of supportive data.

THE FACTFINDER'S REPORT

The factfinder generally issues his report approximately 30 days after the parties submit their final briefs. In potential strike situations, the factfinder may move with greater speed.

The factfinder issues his recommendations in a report prepared for the parties. The report contains an issue-by-issue analysis of the remaining items

in dispute. The factfinder treats each issue separately, but may spend more time discussing the more critical issues, usually salary and fringe benefits. The report is designed to convince the parties to accept his recommendations as the basis for a new agreement. If not, then these recommendations should at least represent the framework for a new agreement.

One prominent feature of a factfinder's report (and one of the reasons for factfinding falling into disuse) is that it is not written to determine justice and equity, but rather it is directed at where the factfinder believes the parties ought to settle. Put another way, the factfinder wants both sides to accept his recommendations, or at least use them constructively in continued negotiations. He does not want either side to reject them out-of-hand. For that reason, a factfinder's report tends to flow with, not against, the tide of settlements in the area.

Another prominent feature is that a report usually does not recommend any radical departures from the *status quo*. The reason is obvious. The value of the report depends upon its ability to get the parties closer to agreement, not to pull them farther apart.

POST-FACTFINDING NEGOTIATIONS

PERC's rules require that the parties must meet within five days after they receive the factfinder's report.⁷ This period gives the parties time to settle their differences on the basis of the factfinder's recommendations. Either party may release the report to the public. The release of the report either in its entirety or in selective portions may serve a tactical purpose, which is to convince any interested parties, including the union membership and the public, of the fairness of the factfinder's recommendations.

If the factfinder's report does not accomplish its intended purpose of getting the parties to agree on a new contract, then the law obligates the parties to negotiate until they reach a settlement. Post-factfinding negotiations are extremely important to school boards from both a tactical and legal standpoint. Tactically, a school board should continue to negotiate in good faith toward a voluntary settlement of the unresolved issues. Eventually, however, the board may be convinced that further negotiations are useless. A board has the legal right to impose its last offer in negotiations, but must first have engaged in all means toward voluntary settlement, including post-factfinding negotiations.⁸ A board should impose only in the face of "absolute" deadlocked negotiations and only upon advice of counsel or a professional negotiator. Concerning the limited right to impose, a board should be prepared always for the possibility of a work stoppage event

⁷N.J.A.C. 19:12-4.3(f).

⁸See *Negotiations News/School Law Reporter*, July/August 1980, pp. 3-4.

that grows with alarming concern as the new school year firmly takes hold.

OTHER AVAILABLE IMPASSE RESOLUTION PROCEDURES

The parties may be unable to settle their differences even after the factfinder issues his report. Should teachers strike or threaten to strike, the union and the board often agree to use a super-mediator or "conciliator." This individual is an experienced mediator who has worked before in extremely difficult and sensitive bargaining situations. There is a charge for the services of ad hoc super-mediators, which is assessed equally against both sides, but there is no charge for PERC staff mediators assigned to these disputes.

Although it is possible that teachers will strike after factfinding has been completed, most public school strikes occur after the first set of mediation efforts has failed. Thus, many teacher organizations strike without ever going to factfinding. This underscores their view of the limited effectiveness of factfinding in achieving their goals.

If mediation, factfinding, or super-mediation (conciliation) does not produce a settlement, then the parties may still agree on any procedure to help them settle. One general procedure, containing many variations, is interest arbitration. This procedure is mandated in New Jersey for police and firefighters negotiations that are not settled voluntarily, and is used only rarely, and on a voluntary basis, elsewhere in New Jersey's public sector. The interest arbitration process allows an arbitrator to impose a settlement, thereby resolving the unsettled bargaining issues.

Fair and final offer arbitration, a most common variation of interest arbitration and the form used in police and firefighter negotiations in New Jersey, provides that each side presents the arbitrator with its final *package* on economic items (salaries, fringe benefits, vacation time, work year, etc.) and its final positions on each, if any, unresolved language issue (agency shop, sign-in procedures). The arbitrator then selects which economic package he believes is most reasonable. He also selects on an issue-by-issue basis from the unresolved language issues that both sides have presented. This award is binding and becomes the parties' new agreement, and a court will only overturn the award in the most unusual circumstances.

Public education negotiators are generally opposed to interest arbitration, because it has the potential of discouraging serious bargaining and because it gives final authority to an outside neutral to do what the parties have been unable to do: establish the terms of a new contract. Most school boards are extremely reluctant to allow an outside third party to determine the content of their new agreements, particularly in two areas—salaries and fringe benefits. An adverse arbitration award setting salaries and benefits could severely damage a board's fiscal position for the next few years.

SUMMARY

The purpose of factfinding is to get the parties to settle their differences after they have been unable to do the same in mediation. Factfinding is more formal than mediation, requiring the submission of briefs and the conducting of hearings. It is also more costly. While mediation is provided free of charge to the parties, the parties must share equally the costs of the factfinder's services and expenses.

Many factfinders will attempt to mediate the dispute before engaging in actual factfinding. Factfinding will usually result in the issuance of a report and recommendations which are non-binding on the parties. Both parties may accept a factfinder's report and settle the dispute, or they may use the report for renewed negotiations and eventual settlement. In addition, the report could be used to the board's tactical advantage, especially if the findings are favorable to the board's position. The factfinder writes his report with a settlement in mind. The report is not generally designed to break new ground or correct what might appear to be an injustice to one side or the other. To that extent, factfinding is a conservative, not an innovative process.

INTRODUCTION

Perhaps the most telling change in school board-teacher negotiations during the last fifteen years is the capacity of local school boards to cope adequately with threatened or actual teachers' strikes. In earlier years, the mere threat of a teachers' strike might have intimidated many school board members into conceding on many major union demands. Today, many board members are prepared to deal effectively with the possibility of a work stoppage. Even though the frequency of teachers' strikes remains low in New Jersey, some teachers have and will continue to use illegal means to achieve their bargaining objectives.¹ This chapter examines the causes of teachers' strikes, negotiations during a strike, operational considerations, legal options, and finally, the post-strike situation.

CAUSES OF TEACHERS' STRIKES

Nearly all teachers' strikes result from some continuing bargaining impasse, usually involving disagreements concerning salary and other economic benefits. The disagreements themselves are generally resolved at some point during the strike; however, there is no hard evidence to suggest that the strike itself results in a settlement higher or better for employees than the settlement the parties would have achieved had there been no strike. Striking employees usually each lose a day's pay for every day they strike; thus, whatever gains they achieve through striking generally *will not* make up for the salary lost.

If teachers lose more money than they hope to gain as a result of their striking, why are there still strikes occurring in New Jersey? Several reasons help to explain this apparent contradiction.

Economic Factor

The economic factor looms large in most strike situations. School

¹See Marc Gaswirth, William M. Weinberg and Barbara E. Kemmemer, *Teachers' Strikes in New Jersey* (Metuchen, N.J.: Scarecrow Press, Inc., 1982).

boards are often faced with the task of attempting to reconcile unrealistic salary demands with restrictive budget caps against the backdrop of a threatened or actual strike situation. The inflation rate is a key factor. As inflation rises, teacher organizations renegotiating contracts settled during periods of lower inflation attempt to make up lost ground. When the inflation rate declines, teacher organizations seek to obtain salary agreements comparable to those agreed to during periods of higher inflation. Thus, a cycle emerges in which teacher organizations may use the inflation factor, as well as what they perceive to be the depressed state of teachers' salaries, to argue for salary increases that may be well beyond the public employers' ability to pay. This sets the stage for the likelihood of conflict in the form of a strike or other type of job action.

Union Politics

Union politics are a frequent contributing cause of a teachers' strike. This often takes the form of rivalry between NJEA and AFT locals either within a particular school district or among surrounding school districts, where their parent organizations are competing for the support of school employees in a particular area. These inter-organizational disputes create a perfect setting for one union to show both its supporters and potential supporters that its brand of militancy earns greater dividends. In addition to inter-organizational rivalry, some local leaders may feel pressure from dissidents within their own union. They may have to become more militant, to placate these dissidents who may be seeking control of the union. Occasionally, these dissidents assume leadership positions in the union and are able to convince their members to strike despite the fact that these members are, by and large, quite satisfied with the conditions under which they work.

Teacher Frustration

Frustration is often another factor in teachers' strikes. The frustration may stem from a variety of reasons, some of which may be related to the teachers' perceptions of their job, self-worth, etc. These frustrations may increase because of protracted and difficult negotiations. Another source of frustration in school districts arises simply from bad personnel relations between the teaching staff and the school board or the teaching staff and the school administrators. These deep-seated hostilities sometimes find their outlet through organized activity, namely a strike.

Bargaining Errors

Bargaining errors too often contribute to a strike. Teacher unions and school boards are both responsible for making these errors.

- Sometimes the union will rile up the membership to put pressure on the school board to make a concession. The union then discovers that the membership has assumed an identity of its own and insists upon going out on strike no matter how reasonable the school board's offer is. That same phenomenon is frequently seen when the union leadership takes the membership out on strike, only to find that they have lost control and are unable to bring their supporters back to work when the parties settle at the bargaining table.
- Teacher strikes can increase in length and intensity when the unions underestimate the resolve of school boards. Many unions strike believing that the school board will capitulate on the first day or two and give the union exactly what it is demanding. Too frequently the union strikes only to discover that the board is unified and unwilling to capitulate. A planned two day strike may now turn into a ten or fifteen day strike.
- A common school board error is the premature firm, fair and final offer. A teachers' union will probably reject an early offer, no matter how reasonable it might be. An early offer may lead the teachers' union to believe that the board has more money available. Consequently, when the school board states that its firm offer in February is really a firm and final offer, the union may reject it as being unrealistic and untrue. This kind of strike is very difficult to settle. A union that strikes to pressure such a board to increase its offer, unfortunately, discovers too late that the board was telling the truth; the board, in fact, has no more money.
- Sometimes the use of personality attacks contributes to a strike. Someone attacked personally at the bargaining table, or perhaps in the press, may naturally want to lash out at the other party making the attack. Should that kind of attack not allow for any sort of face-saving, the object of this personality attack may become very stubborn and very unyielding in his position. The result is that both parties might end up in a strike that neither side wanted.

NEGOTIATIONS DURING A STRIKE

The basic school board strategy turns on whether the school board will attempt to counter the pressure that the union is imposing through the strike. The strike is primarily a labor relations problem and ought to be dealt with through labor relations techniques. A thorough understanding of the collective bargaining process will enable a school district to fare well in the face of a strike. If a school board reacts to the strike as strictly a moral or legal problem, it will not do as well. The strike may raise moral

or legal issues, but a board must address the strike as a labor relations problem.

The following developments occur in virtually all strike situations.

- A mediator appears almost immediately after the strike begins. He may be the same mediator that was there prior to the strike or he may be described as a "super-mediator" or "conciliator." A super-mediator is distinguished from many other mediators on the basis of his experience, style, and general effectiveness at settling a strike. A school board should not avoid mediation and super-mediation in this situation. A strike is obvious evidence that the parties are unable to privately settle their differences. A mediator can be very helpful in getting the parties to settle their differences.
- During a strike, the school board may have to make some movement. The union obviously has not accepted the board's last offer, nor does it really matter how reasonable the board's last offer was. The board will probably have to improve its last offer to get the union to end the strike. The improvement does not have to be substantial. It does not have to be what the union wants; however, the union leadership often must pretend that it has won something as a result of the strike. Consequently, a school board should not make its best offer if it is convinced the union is going to strike, no matter what offer the board makes. In this situation, a school board should save its best offer until after the union has struck and has become willing to accept the board's offer. Alternatively, the board may be able to increase its best offer based upon monies which it has saved by keeping schools open during the strike. Another approach is to reframe the pre-strike offer to make it *look* better than it did when it was last offered. For example, a board might cosmetically increase its overall salary offer by forming it into two semi-annual increases. This might appear to give employees a lot more than they are actually receiving or a lot more than the board's original one year, single increase proposal.
- During a strike the state teachers union will do almost anything it can to support a local striking affiliate. A cadre of union public relations personnel may appear in the struck school district. There may be a strike headquarters set up, perhaps in some empty local store or in a hotel. Frequently the state union representatives will appear at the bargaining table if they have not been there already, and actually take over the bargaining from the local leaders. These union professionals are only human beings; they are not super beings. The public relations people do very common things and with adequate advanced planning by the school board, a board can develop an effective counter-strategy.³

³The New Jersey School Boards Association is prepared to assist school districts prior to or during a strike. Direct assistance on a variety of matters, including strike preparation, operating schools during a strike, and post-strike considerations, is available upon request.

PUBLIC RELATIONS DURING A STRIKE

A critical element for successfully coping with a teachers' strike is a sound and effective public relations program. Bad public relations hurts the school board during a strike. If the public believes that the school board is being very stubborn or very stupid, then the school board is going to be under tremendous pressure to capitulate to the union's demands. A school board can handle its public relations problems effectively during a strike in several ways.

- The board should always have a single spokesperson with whom the media will have exclusive contact. The media appreciates dealing with a single person from whom they can receive accurate information. In this way, the board also avoids the possibility that individual board members and administrators will be contradicting each other by talking to different reporters about the same issue or to the same reporter at different times about the same issue. A school board must protect itself by ensuring that the news media are permitted to speak to only one person, either a board member or an administrator. The remaining board members and administrators should remain silent and not talk to the press whatsoever, regardless of the great pressure and temptation to do so.
- A comprehensive public relations plan is very effective. A school board will get better coverage from reporters if it has developed an ongoing relationship with them. A school board that believes that its employees will strike should contact the news media early to explain the situation, particularly the board's intent to keep schools open. The board spokesperson should note that the board is bargaining in good faith, and hopes that there will be no strike.
- The most effective way of dealing with the news media is through the issuance of written press releases. They are convenient sources of information, from which the reporter often excerpts sizable segments and incorporates them into the finished article. In addition, reporters are less prone to distort and misstate the contents of a carefully written press release than they are an oral statement.

The best result of a school board's public relations campaign during a strike is to neutralize the public's pressure upon the school board. This pressure can be extremely intense. The board's public relations effort will have been successful if it convinces the public not to second-guess each decision made by the board and administration, but rather to allow the board to exercise its best judgment during a strike.

OPERATIONAL CONSIDERATIONS

A school board facing a strike must decide whether it will keep schools open during the strike. School boards are normally advised to open schools in the event of a strike.

- Opening schools puts pressure on the union to end the strike. Labor relations practitioners generally agree that the most effective pressure is economic, rather than legal, moral or political. A school district that keeps schools open during a strike does not have to make up the school days affected by the strike. The district will also qualify for state aid according to its original calendar, which provides for at least 180 student days. Consequently, striking teachers will lose a day's pay for each day of the strike. This loss is not a punishment, but an application of the principle, "No work—no pay." It is identical to private sector experience where wages lost to strikes usually cannot be made up.³
- Should the board close the schools, the district may have to extend the end of the school year to make up instructional days lost. The teaching staff would then be paid their normal salaries for those days.⁴ The net effect is merely that the school year is temporarily suspended; the last day of school is extended later into June, or Christmas and Spring vacations are shortened. This creates almost no pressure on the teachers' union to swiftly settle negotiations. Instead, it provides a psychological boost to the union leadership and members because it is interpreted as a complete union victory.
- Opening schools provides an important community service. Most families using the public schools have either only a single parent who works, or two working parents. These families depend upon the public schools to provide a safe and supervised environment for their children during the school day when there are no parents at home. Opening schools during a strike meets this important community need.

Failure to open schools, however, means that many parents are forced to choose between finding alternate and expensive childcare facilities, leaving the children unsupervised at home, or staying home from work, at a loss of pay or vacation time, to supervise their children. Such parents often form the most vocal community faction pressuring the board to "settle at any price."

³The board also has the non-negotiable right to adopt a sick leave verification policy in connection with a sick-out. *In re Freehold Regional High School District Board of Education and Freehold High School Education Association*, PERC NO. 83-10, 8 NJPER 13206.

⁴*In re Board of Education of Township of Cherry Hill and Cherry Hill Education Association*, PERC No. 79-18, 4 NJPER 4209.

- Many districts have found that they can provide a valid educational program during the difficult days of a teachers' strike. This depends, of course, on good administrative planning and a full commitment by the board.⁵ Some districts, including some very large ones, have maintained a high level of student attendance, as high as 80 percent; they have emphasized that students are expected to attend school and that teaching and learning are continuing.
- The administrative effort needed to provide an effective educational program during a strike is indeed enormous. Although the educational program offered during a strike may not be as good as the regular one, it can still be a program that addresses basic skills at all levels. It should be the best program possible given the "less than best" situation that the teachers' strike has created. Success by the board and its administrative team in this endeavor provides a psychological boost to the board's negotiations efforts, and tends to increase community support for the board during the strike period.
- A commitment to open schools in the event of a strike will deter some strikes, shorten others, and minimize repeat strikes. Any union, in weighing the decision to strike, will consider the costs of a strike compared to the benefits it will gain. If the union knows that the employer can operate indefinitely during a strike, it will be reluctant to order its membership to strike.⁶
- Some strikes have clearly been avoided when the union realized its threat did not intimidate the board, because the board was prepared to take the strike rather than capitulate to unreasonable union demands.
- Other strikes ended sooner once the union realized that the board was prepared to take a long strike. There is some evidence, and common sense supports this conclusion, that teachers who strike with impunity and without loss of pay in one year are prone to threaten to strike in that same district in future years. On the other hand, employees in one district recently lost 10 days pay as a result of a strike that produced only a marginal increase in the board's offer. The likelihood of another strike in that district in the near future is slim.

In some situations the successful opening of schools may lead to a longer strike. First, the board is not under the same intense pressure to

⁵The board's decision to assign administrators and supervisors to unusual duties and responsibilities during a teachers' strike is a management prerogative. After the strike ends, the board may be obligated to negotiate any changes in the terms and conditions of these employees. *In re Camden Administrators' Council Local 39, AFSA, AFL-CIO, and Board of Education of the City of Camden*, PERC No. 80-3, 5 NJPER 10157.

⁶Some strikes are caused by personality conflicts, deep-seated hostilities, or union politics, and these may be unavoidable no matter what stand the employer takes regarding the union demands on the table or the threatened strike.

capitulate as when a strike shuts down schools, so the board may refuse to move off its pre-strike negotiations position. Second, the union may become increasingly adamant about its high salary and benefit demands because it believes it now must save face with its constituents who are losing money as a result of the strike. The union may even believe that the wages lost must be made up through an increased wage offer by the board. This argument obviously involves circular reasoning: "we struck (illegally) to get a better offer from the board; we're losing money during the strike, so the board owes us the money we would have received had we not struck!"

Before a board decides to keep a school open or closed, it should consider the following:

- The most important criterion for opening school is student safety. No district should open its schools without the confidence that its students will enjoy the same degree of supervision and freedom from unsafe conditions that normally exists in the district. In some districts, certain buildings or programs may have to be closed temporarily, or for the strike's duration, if opening them would create an unsafe condition.
- The union will attack the board's decision to open schools as irresponsible. The striking union will probably accuse the board of "holding the students hostage" by opening schools, of providing merely a babysitting service, and of jeopardizing the safety of the student body by running schools that are poorly supervised, chaotic and dangerous. The board can refute these charges only by providing the best educational programs possible during a strike, by permitting neutral community representatives to meet with the board and administration to discuss the condition of the schools and, where appropriate, by inviting these people to tour the school buildings to allay their concerns.

LEGAL OPTIONS

Teachers, or for that matter all other public employees, do not have a statutory, constitutional or common law right to strike.⁷ Public employees have the right to quit their jobs, but they do not have the legal right to withhold services at their will. A school board can obtain a back to work injunction almost automatically from a judge. The injunction would order teachers back to work. Should a school district decide to get an injunction, certain options of enforcement are available.

Some boards have decided not to seek an injunction against a teacher's strike, because they are uneasy with the prospect of teacher jailings or

⁷*Board of Education of Union Beach v. New Jersey Education Association, et al.*, 53 N.J. 29 (1968).

dismissals in the likely event that the injunction is not obeyed; instead, those boards have either sought no injunction, or obtained an injunction only against mass picketing, in order to permit safe entrance and exit of students and substitutes from the school sites.

School boards considering legal action against their striking employees should weigh all the options as well as the likely impact that such action will have on the strike itself and on the post-strike situation. A particular legal approach, like an injunction limiting picketing, may be appropriate in one situation; an injunction against picketing and the strike itself may be appropriate in another situation. Obviously, the board should consult with its school attorney and/or its professional negotiator before it uses any available legal options.

POST-STRIKE CONSIDERATIONS

School board members and school administrators should keep one valuable thought in mind during a strike: "This too shall pass." The strike will end, employees will come back to work, and the district will eventually resume its usual activities. Thus, threatened reprisals against employees during the strike are not helpful. Nor are reprisals at the end of the strike helpful. Frequently the school board and the union sign a reciprocal no-reprisals clause when the strike ends to help the district return to normal. The sooner the district returns to its regular operations of providing a quality education to its students, the sooner the memory of the strike will begin to fade.

SUMMARY

Even though teachers' strikes are illegal in New Jersey, they do occur for several reasons. Economic factors, union politics, teacher frustration, and bargaining errors are among the major reasons. A district encountering a strike must act to counter the pressure that the union action has imposed. Careful use of bargaining tactics during a strike will help a district's position. Important elements in countering union pressure include developing a sound public relations program; providing a safe and effective educational program; and wisely using the available legal options. Board members and school administrators who experience a strike must recognize that the strike will eventually end, and that their actions during a strike must be weighed against their effect on the post-strike situation.

INTRODUCTION

A volume describing collective negotiations would be incomplete without some mention of the contract administration process. Bargaining occurs at specific intervals normally associated with negotiations for a successor agreement, but contract administration is a permanent and continuous process that occurs as long as an agreement is in effect.¹ In addition, a school district's contract administration experience may strongly determine the bargaining objectives that both the board and the union have in future negotiations.

ENFORCEMENT MECHANISM

The contract contains the terms and conditions of employment that the parties have agreed to. Other terms and conditions may be found elsewhere, such as in statutes, rules or regulations, board policies, past practices, or administrative decisions. Regardless of where a term and condition is found, the contract usually contains the mechanism that the union may use to challenge actions that the board and/or its administrators have taken. This mechanism is the grievance procedure, which contains steps paralleling the various levels of authority in the school system. Many negotiated grievance procedures in New Jersey public schools also provide for some form of arbitration of contract disputes. This arbitration step is either advisory (non-binding in nature) or final and binding. In either case, a disinterested, third party determines whether the board has violated the agreement. He may also fashion a remedy, if appropriate.

¹See Marc Gaswirth, Garry Whalen, and Cathleen Otto, *Administering the Negotiated Agreement* (Trenton, N.J.: New Jersey School Boards Association, 1980) for a detailed examination of the legal, practical, and technical aspects of the contract administration process. This book is Volume 7 in the School Board Library Series.

POST-AGREEMENT MEETING WITH ADMINISTRATORS

Because the integrity of the agreement rests with those who administer it, those school management personnel who have contract administration responsibilities should discuss the new agreement. The superintendent and/or his designee should inform all contract administrators about the most recent changes in the agreement and their intent, and emphasize the importance of effective contract administration to the integrity of the school system and personnel relations.

Each contract change needs thorough explanation and discussion to ensure that principals and supervisors understand what the school board and union meant when they agreed to this change; however, knowledge is not enough. Motivation is also important. The superintendent should motivate and hold school administrators and supervisors responsible for adequate contract administration. Without an incentive to do an effective job, these middle-level managers may allow hard-fought contract language gains to fall by the wayside. Ignorance of the new agreement and a lack of motivation in administering it are not only unacceptable, they are counter-productive to the district's long range goal of making the contract work for the district's interests.

The post-agreement meeting may serve the additional purpose of discussing a wide range of contract administration issues. These discussions should occur periodically during the life of the agreement to resolve problems arising of a specific or general nature. Upper and middle-level managers should examine questions concerning, for example, guaranteed preparation time in an elementary school or the length of evening parent-teacher conferences for all teaching staff members before grievances crop up involving those same issues. A common approach to solving such problems can be developed to ensure that the district does not compromise its rights under the agreement.

MAINTAINING RECORDS FOR FUTURE NEGOTIATIONS

Some school districts find themselves at a disadvantage either in negotiations or in the contract administration process because they lack information to support their positions. The beginning of a new contract period is a perfect time to start maintaining accurate records for future negotiations and possible contract administration problems. Administrators should carefully compile records. This recordkeeping task may appear time-consuming, but it may be an indispensable way of protecting the district against attempts to expand employee rights during the contract administration period.

Some examples will illustrate this point. Suppose the union claims that the current length of after-school faculty meetings is exceeding the past

practice in the district, and there is no clear contract language setting forth the length of faculty meetings. Accurate recordkeeping might show that the length of those meetings has varied by as much as thirty minutes. This information may be critical in an arbitration or unfair labor practice proceeding. Suppose that the union alleges the superintendent has granted personal days on the day before or after a holiday or vacation period. Again, if there is no clear contract language controlling this issue, the district could utilize personal leave records to show that it has never been the district's practice to grant personal leave at those times. Even if such situations arose in the past, they did not occur frequently enough to rise to the level of creating a past practice.

Careful recordkeeping will also assist in negotiations. A union demand for a doubling of the number of personal days can be dismissed simply on the basis that the records indicate that most teachers are presently using *all* of the personal days to which they are currently entitled. A doubling of the number of days would require an enormous loss of staff time and an increase in the costs of substitutes. The district's attempt to counter the union demand for more personal days would be far more difficult if records substantiating the board's position were not available.

Careful recordkeeping, however time-consuming, should not be viewed as a trivial task. It is an important one. Any administrator or negotiator whose credibility was challenged either in grievance handling or in bargaining, because the information to support his position was unavailable, can attest to its importance.

SUMMARY

Contract administration and negotiations are interconnected parts of the school board-teacher relationship. In effect, one flows from and into the other. The contract administration experience may determine negotiations objectives, and bargaining results frequently create a new contract administration setting.

A school board should recognize this close interrelationship. Post-settlement meetings and periodic contract administration meetings among district administrators and supervisors will be extremely helpful in identifying actual or potential problem areas in need of attention in the next round of bargaining. Moreover, school administrators should maintain careful records concerning matters related to terms and conditions of employment. These records could be very helpful to the board's future negotiations strategy and to the district's contract administration efforts.



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